86-1108

No. ——

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,
Petitioner,

v.

RICK COX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination applies to a counseled defendant's unwarned statements, made during a court-ordered interview and contained within a presentence investigation report, following nolo contendere pleas to three misdemeanors, when consideration of the statements at the sentencing hearing did not expose the defendant to an enhanced penalty or provide a basis for future prosecution of other crimes?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
1. Summary of Proceedings Below	2
2. Pertinent Factual Background	2
REASONS FOR GRANTING THE WRIT	4
Introduction	4
1. The opinion below raises an important and recurring question of federal law which has not, but should be, decided by this Court	5
2. The decision below conflicts with numerous decisions of other state courts and also with decisions of two courts of appeals	8
3. The decision below is incorrect	10
CONCLUSION	12
APPENDIX A: State v. Cox opinion	1a
APPENDIX B: Denial of Reargument	8a
APPENDIX C: 28 V.S.A. § 204(a & b)	10a
APPENDIX D: V.R.Cr.P. 11(b) and (c)(1-5)	11a
APPENDIX E: Sent.tr. (excerpt) p. 15-16, 21-22	13a
APPENDIX F: V.R.Cr.P. 32(c)(1) and (c)(2)	16a

TABLE OF AUTHORITIES

CASES	Page
Baumann v. United States, 692 F.2d 565 (9th Cir. 1982)	6, 9
Booth v. Commonwealth, 695 S.W.2d 856 (Ky. 1984)	7, 8
Boyd v. United States, 116 U.S. 616 (1886)	10
Burch v. State, 450 N.E.2d 528 (Ind. 1983)	6-7, 8
Commonwealth v. Allen, 489 A.2d 909 (Pa. Sup. 1985)	9
Commonwealth v. Burton, 301 A.2d 75 (Pa. 1973)	6, 8
Estelle v. Smith, 451 U.S. 454 (1981)	4, 5, 6, 7, 11
Gibson v. State, 718 P.2d 283 (Idaho 1983)	6, 8
Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982)	9, 11
Lang v. State, 461 N.E.2d 1110 (Ind. 1984)	7, 8
Matter of Jose D., 485 N.E.2d 1025 (N.Y. 1985)	6, 9
Minnesota v. Murphy, 465 U.S. 420 (1984)	11
People v. Burton, 205 N.W.2d 873 (Mich. Ct. App. 1973) lv. den., 389 Mich. 795 (1973)	7, 8
People v. Daniels, 386 N.W.2d 609 (Mich. App. 1986)	7
People v. Santana, 134 Cal. App. 3d 773 (1982)	6, 8
People v. Williams, 454 N.E.2d 220 (Ill. 1983)	6
Reina v. United States, 364 U.S. 507 (1960)	10
State v. Hicks, 714 P.2d 105 (Kan. App. 1986)	8-9
State v. Kerekes, 673 P.2d 979 (Ariz. App. 1983)	7
Townsend v. Burke, 334 U.S. 736 (1948)	4
Trimmer v. State, 651 S.W.2d 904 (Tex. App. I Dist. 1983)	6, 9
Ullmann v. United States, 350 U.S. 422 (1956)	10
United States v. Chitty, 760 F.2d 425 (2d Cir. 1985)	7
United States v. Dickson, 712 F.2d 952 (5th Cir. 1983)	7, 10
United States v. Gonzalez-Mares, 752 F.2d 1485 (9th Cir. 1985)	11
United States v. Tucker, 404 U.S. 443 (1972)	4
United States v. Wilson, 598 F.Supp. 138 (E.D. Pa. 1984)	7

TABLE OF AUTHORITIES—Continued

	Page
Wasman v. United States, 468 U.S. 559 (1983)	4
Williams v. New York, 337 U.S. 241 (1949)	4
STATUTES AND RULES	
Title 18 United States Code § 3552	4
Title 28 United States Code § 1257(3)	1
Title 28 Vermont Statutes Annotated § 204(a)	4
Federal Rules of Criminal Procedure, Rule 11	11
Vermont Rules of Criminal Procedure, Rule 11	11
Vermont Rules of Criminal Procedure, Rule 32	4, 11
CONSTITUTIONAL PROVISION	
Fifth Amendment, United States Constitution	2, 10

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OPINION BELOW

The opinion of the Supreme Court of Vermont appears in Appendix A and is published in 147 Vt. —— (1986), which also appears in 517 A.2d —— (1986).

JURISDICTION

The judgment of the Supreme Court of Vermont, entered on October 10, 1986 (Appendix A), vacated respondent's sentence, and, on remand, required that a new presentence investigation (PSI) report be prepared for use at resentencing by a judge who had not reviewed the stricken PSI report. The Supreme Court of Vermont denied a timely petition for rehearing on November 3, 1986. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

1. Summary of Proceeding Below

At the beginning of the sentencing hearing, defense counsel orally claimed "that it must be constitutionally necessary for the probation officer who is preparing a PSI to inform as to police officers would tell a defendant his rights he is waiving and what trouble he might get himself into by being fully open and not remaining silent." T.13, Sent.Hrg. (Jan. 25, 1984). On appeal appellant argued that "[t]he PSI report relied upon by the trial court in sentencing appellant contained information obtained in violation of appellant's privilege against self-incrimination and right to counsel." (Appellant's Brief, p. 6). This claim was premised on the Fifth Amendment of the United States Constitution and its counterpart, Chapter I, Article 10, in the Vermont Constitution. The Supreme Court of Vermont based its decision solely on the federal protection provided by the Fifth Amendment.

2. Pertinent Factual Background

Respondent was originally charged by information with three counts of kidnapping in violation of a state statute, 13 V.S.A. § 2401. Following a plea agreement, the felony counts were amended to three misdemeanor counts of simple assault to which the respondent entered pleas of nolo contendere. Due to the gravity of the criminal conduct, which arose upon nonpayment of a debt for the

purchase of drugs, a PSI report was ordered at the December 9, 1983 change of plea hearing. The report was filed at the court along with a letter from defense counsel who protested the consideration of this report by the judge at sentencing.

The letter was treated as a motion to excise. The court did strike certain portions of the report but stated on the record that the report should contain as much material as possible pertaining to the defendant's background. See App.E. While the court indicated its willingness to hear evidence regarding the defense objections to the report, no evidence was proffered. Defense counsel made a claim regarding the need for constitutional protections surrounding the taking of statements during a presentence interview. Counsel represented that although the defendant, who was interviewed while incarcerated for lack of bail, expressed an interest in speaking with the investigator at the public defender's office, the probation officer insisted the interview could not be postponed and left the respondent with a "now or never" choice. No evidence was taken from the probation officer regarding either this choice or the nature of the interview and the style of questioning, if any, which was employed. The defendant, however, was afforded his right of allocution at the sentencing hearing.

The court sentenced the respondent to three consecutive terms of confinement totalling eighteen months to three years, despite the recommendations of both parties for a lesser period of incarceration. The Supreme Court of Vermont struck these sentences and remanded the case for the preparation of a new PSI report and resentencing. The Court below concluded that a defendant who is awaiting sentencing may invoke the federal privilege against self-incrimination in order to prevent the possible enhancement of his sentence. Appendix A. The Court failed to discuss the nature of the enhancement. The Court also refused to grant the State's motion for re-

argument which sought a remand to the lower court for an evidentiary hearing on the question of whether the interview constituted custodial interrogation.

REASONS FOR GRANTING THE WRIT

Introduction

This Court is presented with the opportunity to decide whether the scope of the Fifth Amendment privilege extends to a non-capital, post-conviction, presentence situation, not previously considered by this Court, and expressly left open by its decision in *Estelle v. Smith*, 451 U.S. 454, 469, n.13. (1981). The question of the applicability of the federal privilege against compelled self-incrimination in the presentence interview stage in non-capital cases is one of obvious importance to defendants, correctional personnel who are charged with gathering defendant's background to aid the courts, and judges who may consider unwarned statements when making individualized sentencing determinations.

A presentence investigation report conveying the broadest information about a defendant's characteristics is highly relevant, if not essential, to the imposition of an appropriate sentence. *Wasman v. U.S.*, 468 U.S. 559, 563 (1983); *Williams v. N.Y.*, 337 U.S. 241 (1949).[1] The Due Process Clause of the Fifth Amendment has insured the truthfulness and accuracy of material considered by the court at sentencing, *U.S. v. Tucker*, 404 U.S. 443 (1972), *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). Aside from these guarantees, however, the improper application of the privilege against compelled self-incrimination creates an obstacle to the gathering of information, and to the extent the information is limited, interferes with the exercise of judicial discretion at sentencing.

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[1] PSI reports are generally required in Vermont pursuant to 28 V.S.A. § 204(a) and V.R.Cr.P.32(c). (See Apps. C and F.) They are mandated in federal court pursuant to 18 U.S.C. § 3552.

The decision below conflicts with numerous decisions of other state courts and also with decisions of two Courts of Appeals. Thus, when faced with the issue of judicial reliance on a defendant's unwarned statements made to a probation officer, in the context of a presentence interview, following guilty pleas or their equivalent, lower courts diverge in their application of the Fifth Amendment privilege. The decision below is incorrect and reversal is mandated because the lower court erroneously extended the Fifth Amendment's protections, ruled on the basis of an inadequate evidentiary sentencing record, and mistakenly relied on *Estelle v. Smith*.

1. The Opinion Below Raises An Important and Recurring Question of Federal Law Which Has Not, But Should Be, Decided By This Court.

The Court below held that a counseled defendant who has pled nolo contendere to reduced charges and is interviewed for a court-ordered PSI report retains his Fifth Amendment privilege. See Appendix A. The lower court erroneously relied on *Estelle v. Smith* when it viewed the defendant's sentence as enhanced simply because the sentencing judge imposed a sentence that was in excess of the recommendations of both parties although it was within the statutory limits.[2]

The extent of the reach of the protections of the Fifth Amendment, which trigger Miranda warnings during a presentence interview,[3] is an important and recurring question of federal law which was not decided by this

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[2] Any "enhancement" to sentencing here is radically different from that obtained in a capital case when the death penalty may be the ultimate outcome. Enhancement takes place when an additional penalty is imposed, *Estelle v. Smith*, or, upon resentencing, when a higher sentence is ordered. *Wasman v. U.S.*, 468 U.S. at 569. Here the respondent was sentenced only once within the statutory guidelines.

[3] The opinion below never decided whether the interview constituted custodial interrogation.

Court in *Estelle v. Smith, supra.* It is necessary that this Court address itself to an analysis of the reach of the Fifth Amendment privilege in the factual context of a presentence interview in order to take the next step in defining the scope of the privilege.

This Court's holding in *Estelle v. Smith*, that the Fifth Amendment privilege is applicable to the penalty phase of a bifurcated capital proceeding, is limited to the "distinct circumstances" which were presented in that case. *Estelle*, 451 U.S. at 466. Some lower courts have read *Estelle* narrowly: *Baumann v. United States*, 692 F.2d 565, 576 (9th Cir. 1982) ("We believe it appropriate to read *Estelle* narrowly."); *Matter of Jose D.*, 485 N.E.2d 1025, 1027 (N.Y.C.T.App. 1985) ("We note that *Estelle* has been limited to its unique facts"); *Trimmer v. State*, 651 S.W.2d 904, 906 (Tex. App. 1 Dist. 1983) (although finding that the Texas Criminal appellate court had not addressed the issue, the court refused to extend *Estelle*, and thus refused to apply the federal privilege outside the unique set of circumstances presented in *Estelle*).

Other courts have relied on additional or different reasons to prevent the extension of the privilege to routine PSI interviews. See, *Com. v. Burton*, 301 A.2d 675, 677 (Pa. 1973) ("The purpose of *Miranda* would not be served if we were to extend its application to the presentence interview."); *People v. Williams*, 454 N.E.2d 220, 242 (Ill. 1983) (Illinois statute provides constructive notice to defendant that PSI might be used against him and no privilege attaches to communication between a defendant and probation officer.); *Gibson v. State*, 718 P.2d 283, 290 (Idaho 1986) (limiting *Estelle* to its facts and finding that the psychiatrist's section of PSI did not influence the court to find aggravating circumstances, and no violation of either federal or Idaho law.); *People v. Santana*, 134 Cal.App.3d 773, 779 (1982) (reliance on role of probation officer, public policy arguments and inappropriateness of *Miranda*); *Burch v. State*, 450 N.E.2d 528,

530 (Ind. 1983) (reliance upon *Baumann*), and cited with approval in *Lang v. State*, 461 N.E.2d 1110, 1115-1116 (Ind. 1984) ("At the time of the presentence interview, the guilt determination has been concluded and statements which the defendant makes cannot be used to convict him of any crime." "No potential for incrimination is present (at PSI interview) . . ."); *United States v. Dickson*, 712 F.2d 952, 954, n.1 (5th Cir. 1983) (because of entry of guilt, consideration of privilege claim foreclosed); *Booth v. Commonwealth*, 675 S.W.2d 856 (Ky. 1984) (no custodial interrogation then no necessity for *Miranda* warnings); *People v. Burton*, 205 N.W.2d 873, 875 (Mich. Ct. App. 1973) lv.den. 389 Mich. 795 (1973) (defendant's guilt already determined on principle charge, privilege inapplicable at PSI interview) followed in *People v. Daniels*, 386 N.W.2d 609, 612 (Mich. App. 1986).

Although *Estelle* left open the question of whether the same Fifth Amendment concerns present in that case applied to other types of interviews that might be used at the sentencing stage of a criminal proceeding, *Estelle*, 451 U.S. at 469, n.13, some lower courts have ignored this Court's cautionary proviso and instead read *Estelle* expansively. E.g., *United States v. Chitty*, 760 F.2d 425, 431 (2d Cir. 1985); *United States v. Wilson*, 598 F.Supp. 138, 142 (E.D. Pa. 1984); *State v. Kerekes*, 673 P.2d 979, 981 (Ariz. App. 1983).

It is clear that a conflict in decisions is presented to this Court on the precise issue raised by the opinion below. The federal question was properly raised in the lower court by defendant's counsel at the sentencing hearing. This Court is presented with a question which demands immediate attention since this Court has not spoken since *Estelle v. Smith* on the applicability of the Fifth Amendment privilege to the sentencing stage of a typical criminal prosecution.

2. The Decision Below Conflicts With Numerous Decisions of Other State Courts And Also With Decisions Of Two Courts Of Appeals.

The decision below decided a federal question, which conflicts with decisions of other lower courts. The conflict is on an important issue of federal law: does a convicted, counseled, defendant retain the Fifth Amendment privilege during a routine PSI interview after he has entered nolo pleas and where his sentence is not enhanced?

The Court below ruled that the defendant had rightfully asserted his Fifth Amendment privilege during a routine PSI interview, and therefore the statements subsequently obtained were involuntary and should not have been relied upon by the sentencing judge. That part of the court's decision which holds the federal privilege against compelled self-incrimination applies at the PSI interview stage conflicts with several appellate decisions from state and federal courts which have found the privilege inapplicable in this setting.

The opinion below squarely conflicts with four state appellate decisions which considered the issue of whether *Miranda* warnings need be given prior to the PSI interview. *Burch*, *supra* at 529-530 (Miranda warnings inapplicable to presentence interview). For the same result, see *Santana*, at 739-740; *Burton* (Pa.) at 677; *Booth v. Com.*, 651 S.W.2d 856, 904.

The opinion below conflicts in principle with eight other state appellate decisions: *Lang*, 461 N.E.2d at 1115 (Ind. 1984) (PSI not critical stage demanding attorney and "no potential for incrimination present" at this stage); *Gibson*, 718 P.2d at 290 (since unwarned statements in psychiatric part of PSI where not used to aggravate sentence, Fifth Amendment privilege inapplicable); *Burton*, 205 N.W.2d at 875 (privilege not extended to PSI interview); *Williams*, 454 N.E.2d at 242 (Fifth Amendment right to remain silent not violated by probation officer's testimony at sentencing hearing); *State v. Hicks*,

714 P.2d 105, 107 (Kan. App. 1986) (no Fifth Amendment privilege at PSI stage where no statements made which led to uncharged criminal activity); *Trimmer*, 651 S.W.2d at 907 (no right to silence attaches at PSI interview); *Matter of Jose D*, 485 N.E.2d at 1026 (Miranda warnings inapplicable at post juvenile findings, predisposition stage); *Comm. v. Allen*, 489 A.2d 909, 911 (Pa. Sup. 1985) (where no threat of contempt or harsher sentence is present, privilege is waived).

The opinion below is in direct conflict with a Ninth Circuit case, *Baumann v. United States*, in which a panel of the 9th Cir. held that "neither *Estelle* itself, nor the general principles announced in *Miranda*, require that a convicted defendant be warned of his right to counsel and his right to remain silent prior to submitting to a routine, authorized presentence interview." *Baumann*, 692 F.2d at 576.[4] *Baumann* involved a non-capital proceeding where the Ninth Circuit rejected the argument that Miranda warnings are necessary at the post-conviction, presentence stage because the policies underlying *Miranda* would not be served in a setting where information is only obtained to assist the court for sentencing purposes. *Id.* at 576-77. In distinguishing *Estelle*, the Court stated that "there is a substantial difference between a psychiatric examination of the defendant in a capital case which seeks to elicit evidence from the defendant relating to the critical aggravating factor of dangerousness, and a "routine" presentence interview (citation omitted), restricted to gathering information upon which the district court, in

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[4] *Baumann* itself is only apparently in conflict with another Ninth Circuit case, *Jones v. Cardwell*, 686 F.2d 754 (1982), in which a panel held a convicted defendant could properly claim the protection of privilege. In *Cardwell*, in contrast to *Baumann*, the information obtained during the PSI interview was used by the sentencing judge to *enhance* defendant's sentence. The court reserved decision on whether or under what circumstances a defendant is entitled to *Miranda* warnings in the post-conviction, presentence setting. *Id.* at 757, n.2.

its discretion, may rely when imposing sentence." *Id.* at 576.

Likewise the Fifth Circuit has noted that a Fifth Amendment self-incrimination claim does not extend to alleged violations at a presentence interview once a defendant has pled guilty. *United States v. Dickson*, 712 F.2d 952, 954, n.1 (1983).

3. The Decision Below Is Incorrect

The decision below is premised on incorrect factual assumptions. It should be emphasized that the part of the lower court's holding which goes to the defendant's "assertion" of the privilege, the involuntariness of his statements, and the reliance by the sentencing judge upon those statements, is based on an absent record. In addition, Cox and his attorney consented to the PSI. Since the information obtained by the probation officer was cumulative to that provided by the victims who had been previously acquainted with Cox through mutual drug trafficking, it is unclear whether the sentencing judge relied exclusively on the information in the PSI or whether the circumstances of the criminal conduct in the underlying offenses portrayed Cox as a drug dealer. In either case, the sentence was not enhanced. In any event the information obtained could not have been used to support convictions for other crimes.

The opinion below is also an incorrect application of constitutional principles. The scope of the Fifth Amendment privilege against self-incrimination is restricted to proceedings which carry a "danger to a witness forced to give testimony leading to the reflection of 'penalties affixed to criminal acts . . .'" *Ullmann v. U.S.*, 350 U.S. 422, 438-39, quoting *Boyd v. U.S.*, 116 U.S. 616, 634 (1886). Thus once a witness has been convicted for the transactions in question, his claim to the privilege is unavailing. *Reina v. U.S.*, 364 U.S. 507, 513 (1960). Once the defendant has admitted his guilt and awaits sentenc-

ing, when the purpose for gathering statements from the defendant is not punitive, his position is no different from that of the witness described above. The defendant, like the witness, faces no new range of penalties for the underlying prosecution other than those statutorily imposed for the crime itself. To hold otherwise suggests that a reluctant defendant would be entitled to a grant of immunity to prompt background information for his own sentencing.

The lower court's decision is wrong because it relied on *Estelle* and *Jones v. Cardwell*, cases inapposite to the facts at hand. The controverted statements at issue concerned the defendant's drug trafficking in general and in no way served to "incriminate" him in regard to the pending case or to future criminal charges. "After conviction, the danger of introducing responses to a probation officer's questions at the trial for the underlying offense is virtually nonexistent." *U.S. v. Gonzalez-Mares*, 752 F.2d 1485, 1490 n.5 (9th Cir. 1985).

The plea of nolo contendere, like a guilty plea, waives the right against self-incrimination. See V.R.Cr.P.11 and F.R.Cr.P.11. Once the privilege was waived, the information regarding a career of drug trafficking was relevant to the aims of sentencing.

Respondent's statements, moreover, cannot be viewed as "involuntary" in the constitutional sense, since the choice of whether to continue with the presentence interview without the presence of a representative from the public defendant's office cannot be viewed as "coercion". The respondent certainly was not in an analogous position to those individuals in the so-called "penalty" cases who were forced to forgo the protections of the privilege. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). He still retained his right to allocution under V.R.Cr.P.32(a)(1)(C).

The lower court's erroneous decision will have serious consequences for the persons charged with the gathering

of information used to aid the court in its sentencing determinations. Presentence preparations may be lengthened, leading to delay in sentencing. Courts will be thwarted since the policy of individualized sentencing will be undermined. Requiring *Miranda* warnings will raise other questions concerning the administration and waiver of those rights. These consequences are at odds with the information gathering function of the probation officer and the need of the court to be fully informed at sentencing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant the petition for a Writ of Certiorari to review the decision of the Vermont Supreme Court or, in the alternative, to remand the cause to the Vermont Supreme Court with instructions for an evidentiary hearing to take place at the District Court of Vermont.

Respectfully submitted,

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Dated: January 2, 1987

APPENDICES

APPENDIX A

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

SUPREME COURT
September Term, 1985

No. 84-105

STATE OF VERMONT

v.

RICK COX

[Filed Oct. 10, 1986]

On Appeal from District Court of Vermont,
Unit No. 2, Chittenden Circuit

Paul F. Hudson, J.

Jeffrey L. Amestoy, Attorney General, and Susan R. Harritt, Assistant Attorney General, Montpelier, for plaintiff-appellee

David W. Curtis, Defender General, Henry Hinton and William A. Nelson, Appellate Defenders, Montpelier, for defendant-appellant

PRESENT: Allen, C.J., Hill, Peck, Gibson and Hayes, JJ.

GIBSON, J. Defendant Richard Cox was convicted of three counts of simple assault in violation of 13 V.S.A. § 1023(a)(3). Originally charged with kidnapping, defendant entered nolo pleas to the amended charges and was sentenced to three consecutive terms of six to twelve months. Defendant raises two claims on appeal: (1) the sentencing court relied on information in the presentence report that was obtained in violation of defendant's privilege against self-incrimination and defendant's right to counsel; and (2) the sentencing court's reliance on unverified allegations of defendant's prior criminal activity violated the rule of *State v. Williams*, 137 Vt. 360, 364, 406 A.2d 375, 377 (1979), *cert. denied*, 444 U.S. 1048 (1980).

After defendant's conviction, the trial court ordered a presentence investigation (PSI), including an interview of defendant by the Department of Corrections pursuant to V.R.Cr.P. 32(c)(1). At sentencing, the court imposed a sentence that exceeded the recommendations of both parties, yet was within the statutory limits for the offense. 13 V.S.A. § 1023(b).

Defendant claims the sentencing judge relied on statements in the PSI that were taken after he asserted his Fifth Amendment privilege against self-incrimination, and that he made the statements involuntarily. We agree. Because we vacate defendant's sentence on the basis of his constitutional claim under the Fifth Amendment, we do not address his other claims.

The record reveals that a PSI interview was scheduled at the correctional institution where defendant was incarcerated awaiting sentencing. A public defender representing defendant sent an investigator from her office to offer assistance to defendant on the day of the interview. The investigator had not arrived when the probation offi-

cer began the interview with defendant. Defendant made a request to speak with the investigator from the public defender's office prior to answering any questions; the officer, however, indicated she would abandon the interview if defendant chose to await the arrival of the investigator.

The self-incrimination clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1963), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The appellee, State of Vermont, argues that defendant waived his privilege against self-incrimination upon entry of his nolo contendere plea. V.R.Cr.P. 11(c)(4).

A nolo contendere plea is one "by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *North Carolina v. Alford*, 400 U.S. 25, 35 (1970) (footnote and citation omitted); see also *In re McMorrow*, 133 Vt. 472, 474, 346 A.2d 218, 220 (1975) (although defendant does not admit guilt with nolo contendere plea, right to jury trial, privilege against self-incrimination and right to be confronted by accusers are waived); V.R.Cr.P. 11(c)(4) (plea of guilty or nolo contendere waives "the privilege against self-incrimination, the right to a trial by jury or otherwise, and the right to be confronted with the witnesses against him . . .").

The waiver of the privilege against self-incrimination, however, relates only to the determination of guilt or innocence of the crime for which the plea is entered. *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973). "While a defendant . . . waiv[es] the privilege with respect to the particular crime, . . . he would have no reason to suppose that he was otherwise forfeiting the

privilege." *Id.* at 1210 (citation omitted); see *United States v. Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985) (defendant "retained his Fifth Amendment rights while awaiting sentencing" despite nolo plea). More specifically, "[a] defendant who has pleaded guilty but who is awaiting sentencing may invoke the Fifth Amendment privilege against self-incrimination in order to prevent the possible enhancement of his sentence." *United States v. Wilson*, 598 F. Supp. 138, 142 (E.D. Pa. 1984) (citing, among other cases, *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of [a defendant's] trial so far as the protection of the Fifth Amendment privilege is concerned.")).

The State argues further that even if defendant possessed the Fifth Amendment right not to incriminate himself, he failed to exercise or assert the privilege at the PSI interview. The transcript of the sentencing hearing, however, does not support the State's contention. Defense counsel informed the court that

> when the Probation Officer came to interview our client we in fact arranged for our investigator to go down and talk with him to prepare him for what would be coming forward, and he indicated to the Probation Officer that he really didn't want to talk to her until [the investigator on the case] was there. . . . And she indicated to him that that was fine but she wouldn't come back again. And made him feel as though he would have no opportunity to consult with us before talking with her. So that much of the material which has been included . . . are things that our client would have been advised about had he had an opportunity to speak with us first.

This statement, uncontroverted by the State, reveals defendant's reluctance to provide information to the probation officer before speaking to the investigator from the public defender's office.

We note that defendant asked for an investigator rather than an attorney. In *Fare v. Michael C.*, 442 U.S. 707, 724 (1979), the United States Supreme Court held that a juvenile defendant's request, made during custodial interrogation, for his probation officer is not a per se invocation of the defendant's Fifth Amendment rights. In so holding, the Supreme Court distinguished between the role of a probation officer and the role of an attorney in the criminal justice system. *Id.* at 719-24. The Court observed that a "probation officer is [an] employee of the State which seeks to prosecute the alleged offender[,]" *id.* at 720, and that the duties of a probation officer may often be "incompatible with the view that he may act as a counselor to a juvenile accused of crime." *Id.* at 720 n.5. Finally, the Court stated that "courts may take into account such a request in evaluating whether a juvenile in fact had waived his Fifth Amendment rights . . ." and that the question of waiver is to be determined "upon an inquiry into the totality of the circumstances surrounding the interrogation. . . ." *Id.* at 724-25.

This Court has noted that " '[v]aluable rights are not lost through their inartful assertion . . . .' " *State v. Mosher*, 143 Vt. 197, 203, 465 A.2d 261, 264 (1983) (quoting *United States v. Crowder*, 691 F.2d 280, 282 (6th Cir. 1982). In the case at hand, defendant, by indicating a desire to confer with the investigator for the public defender's office, demonstrated his concern that additional legal advice was necessary before proceeding with the interview. The investigator, an employee of defendant's legal representative, was clearly allied with defendant, a position much different from that occupied by a probation officer.

The record in this case reveals that the probation officer told defendant that if he delayed the PSI interview to confer with the investigator, she would abandon the interview. The officer, though not expressly denying defendant the right to additional legal consultation prior to question-

ing, conditioned the exercise of the right on his forfeiture of the interview itself. If defendant maintained his silence until he had the opportunity to speak with the investigator, he would have had no need for additional advice because, according to the probation officer, there would have been no PSI interview. In essence, defendant was presented with two choices: (1) to await the investigator and forfeit the interview, or (2) to proceed with the interview without additional advice. Additionally, defendant was incarcerated at the time of the PSI interview. See *Jones v. Cardwell*, 686 F.2d 754, 757 (9th Cir. 1982) (fact that defendant was in jail awaiting sentencing is a factor to be considered in determining voluntariness of statements made during PSI interview).

"The sentencing court should refuse to consider the defendant's statement in a pre-sentence report where the statement is demonstrated to have been, under all the circumstances, involuntary as induced by violence, threats, promises, or other improper influence." *Burch v. State*, —— Ind. ——, ——, 450 N.E.2d 528, 530 (1983); see also *Jones v. Cardwell*, *supra*, 686 F.2d at 757 (where jailed petitioner was instructed he had no choice but to answer questions put to him by probation officer during PSI, his confession of other crimes, extracted without warning as to the consequences, was a violation of his Fifth Amendment rights). We consider the condition under which defendant continued with the PSI interview to be coercive, thereby rendering defendant's statements involuntary, in violation of his rights under the Fifth Amendment.

Finally, the State argues that even if defendant's Fifth Amendment privilege against self-incrimination was violated, the sentencing court had identical information properly before it from the independent source of one victim's statement, also included in the PSI report. We agree that some of the objectionable material regarding defendants drug-related activities was included in the

victim's version. In defendant's version, however, the probation officer reported additional, more-detailed statements, rendering the State's argument unpersuasive.

We also cannot agree with the State's claim that defendant failed to show that the sentencing judge relied on defendant's statements during sentencing. Again, the record does not support the State's contention. The judge stated that

> Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From what some of the things you said that it may have been.

We conclude that consideration by the sentencing judge of defendant's incriminating statements made after he requested consultation violated defendant's Fifth Amendment rights.

Sentence vacated. The PSI report is to be stricken from the file; case remanded for preparation of a new PSI report and resentencing before a trial judge who has not reviewed the stricken presentence report.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

APPENDIX B

Supreme Court
Form No. 3

Entry Order

Supreme Court Docket No. 84-105
October Term, 1986

Docket No. 3044-8-83CnCr

STATE OF VERMONT

v.

RICK COX

[Filed Nov. 3, 1986]

Appealed From:
District Court of Vermont
Unit No. 2, Chittenden Circuit

In the above entitled cause the Clerk will enter:

The motion to reargue is denied

[ ] PUBLISH

[✓] DO NOT PUBLISH

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN Chief Justice

/s/ William C. Hill
WILLIAM C. HILL

/s/ Louis P. Peck
LOUIS P. PECK

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III

/s/ Thomas L. Hayes
THOMAS L. HAYES Associate Justices

APPENDIX C

Title 28 Vermont Statutes Annotated § 204

§ 204.—Submission of written report; protection of records

(a) A court, before which a person is being prosecuted for any crime, may in its discretion order the commissioner to submit a written report as to the circumstances of the alleged offense and the character and previous record of the person, with recommendation.

(b) The court shall order such a report to be made before imposing sentence when the respondent is adjudged guilty of a felony, except as otherwise provided by rules of the supreme court. If the report has been made to any court within the state within a period of two years with reference to such individual, in connection with the same or another offense, submission of a copy of that report may fulfill the requirements of this section, if the court to which the report is to be submitted approves. Upon request, the commissioner shall furnish a state's attorney with a copy of any report made within the state once sentence has been passed in connection with the offense for which the report was made.

* * * *

APPENDIX D

RULE 11. PLEAS

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the effective administration of justice. A plea of nolo contendere shall have the same effect as a plea of guilty, except that it shall be admissible in evidence against the defendant in any criminal or civil proceeding only to the extent provided in paragraph (5) of the subdivision (e) of this rule. A conviction based upon a plea of nolo contendere shall be admissible in evidence for all purposes for which a conviction based upon a plea of guilty is admissible.

(c) Advice to Defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by so pleading he waives the privilege against self-incrimination, the right to a trial by jury

of otherwise, and the right to be confronted with the witnesses against him;

(5) if there is a plea agreement and the court has not accepted it pursuant to subdivision (e)(3) of this rule, that the court is not limited, within the maximum permissible penalty, in the sentence it may impose;

APPENDIX E

• • • •

[15] and lascivious conduct charge, what is essentially conviction information. *Williams* decision is limited in its application to standard 2.3 of the American Bar Association's standard of probation. It is pretty much the basis of the *Williams* decision as this Court sees it. The prohibition of that ABA standard that our Court seems to have adopted is that in presenting a presentence report unproven allegations of arrest information cannot be included in the defendant's criminal record portion of the report. That was my dialogue with Miss Farley a few moments ago. I don't believe in its opinion in *Williams* that our Supreme Court was meant to limit certain other types of information that the Court could consider at sentencing that might include possibility of criminal conduct. I am referring now specifically to another Williams case which is *Williams versus New York.* This is at 337 U.S. 241, 1949 case where Williams was being sentenced for murder committed during the course of a burglary. The sentencing Court considered some 30 other burglaries that he had been involved in at the time he was sentenced. In a very interesting opinion by Justice Black it was indicated to the Court that this information could not only be beneficial to the State, could be beneficial to the defendant because it permitted the Court to set a rational sentence, and there could be a reasonable sentencing plan established [16] when you're dealing with the whole individual rather than with some of the materials being hidden. That consideration, by the way, was under the Fourteenth Amendment of the Constitution. That type of thing is followed in *Greg versus United States*, 394 U.S. 489, 1969 case. It indicated there aren't formal limitations on a presentence report contents. They may rest on hearsay, and they may not necessarily have a bearing on the crimes which the Defendant was charged, broader information. It is followed as well as *U.S. v. Tucker*, 404 U.S. at 443, 1972 case.

As far as the information in this case is concerned, it is particularly germane to what Mr. Cox is about when the Court considers what is in the report. Appears essentially to be reliable information because it's either information Miss Farley had or that the Defendant has given her. It's in the Court's assessment protected where it has satisfied the due process requirement and has satisfied the ABA standard. Also an opportunity in Rule 32 of the Criminal Rules to protest the report, to present oral testimony to the Court and present argument to the Court, to present any other type of information to the Court that's neeeded such as the letter I have received from the Defense today and I'm considering in this decision.

• • • •

[21] suitable sentence.

THE COURT: Well, Mr. Cox, if those three people in that car weren't terrorized, they were either immortal or foolish. Nine millimeter is a relatively deadly piece of equipment; and as we all know, that's the basis for the center part of the case.

Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From what some of the things you said that it may have been. This is not a beckoning country for that type of activity. I will conclude my statements in a minute. I certainly am optimistic in some respects from this report that you have decided to change your lifestyle with regard to illicit drugs; because that is part of the sentence, and I intend to recommend drug counseling as appropriate for you, because I do think that you can make progress.

You're a young man. You got an opportunity. You have prior convictions that have suggested to the Court that parole hasn't worked or probation hasn't worked in the past, but there again is an opportunity if you want

to turn the corner. I can sit here and impose any sentence that is within the statute, but it's up to you to decide that this is enough. You have gotten sick of [22] beating your head against the wall. The pain will stop when you quit. Okay? I'm concerned that there be a punishment in your case, because of what has occurred; and I think you probably came here today expecting that. At least you would have been less than candid with yourself if you didn't. I expect that rehabilitation will occur in your case, because that I expect will happen for anyone or at least should. I also expect that as a result of this case there will be some deterrence for you in the future for ever trying to commit this type of offense again, and I certainly hope the public gets the message.

For these three counts of simple assault, Mr. Cox, I commit you on the first count to the Commissioner of Corrections' custody for a term of not less than six, no more than twelve months. On the second count I commit you to a consecutive term of six to twelve months; and the third count I commit you to a consecutive term of six to twelve months.

Anything further counsel? There is credit awarded for the time the Defendant has been held in custody.

MS. FOWLER: No, thank you, your Honor.

THE COURT: Okay, you're remanded to the Commissioner's custody.

APPENDIX F

RULE 32. SENTENCE AND JUDGMENT

• • • •

(c) Sentencing Information.

(1) *Presentence Investigation, When Made.* A presentence investigation shall not be initiated until there has been an adjudication of guilt unless the defendant consents to such action. The commissioner of corrections shall make the presentence investigation and report to the court before the imposition or deferment of sentence or the granting of probation, except that the court, in its discretion, may dispense with the report, in the following situations:

(A) if the offense is a misdemeanor;

(B) if the defendant has two or more felony convictions;

(C) if the defendant refuses to be interviewed by a probation officer or requests that disposition be made without a presentence report;

(D) if it is impractical to verify the background of the defendant.

A report made prior to an adjudication of guilt shall not be submitted to the court or its contents disclosed to anyone until after such adjudication, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time and may, if the defendant's consent expressly so states, permit the defendant's attorney, or a defendant appearing pro se, and the attorney for the state to inspect the report.

(2) *Presentence Investigation Report.* The report of the presentence investigation shall contain any prior

criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

• • • •

(2)

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,
Petitioner,

v.

RICK COX,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

RESPONDENT'S BRIEF IN OPPOSITION

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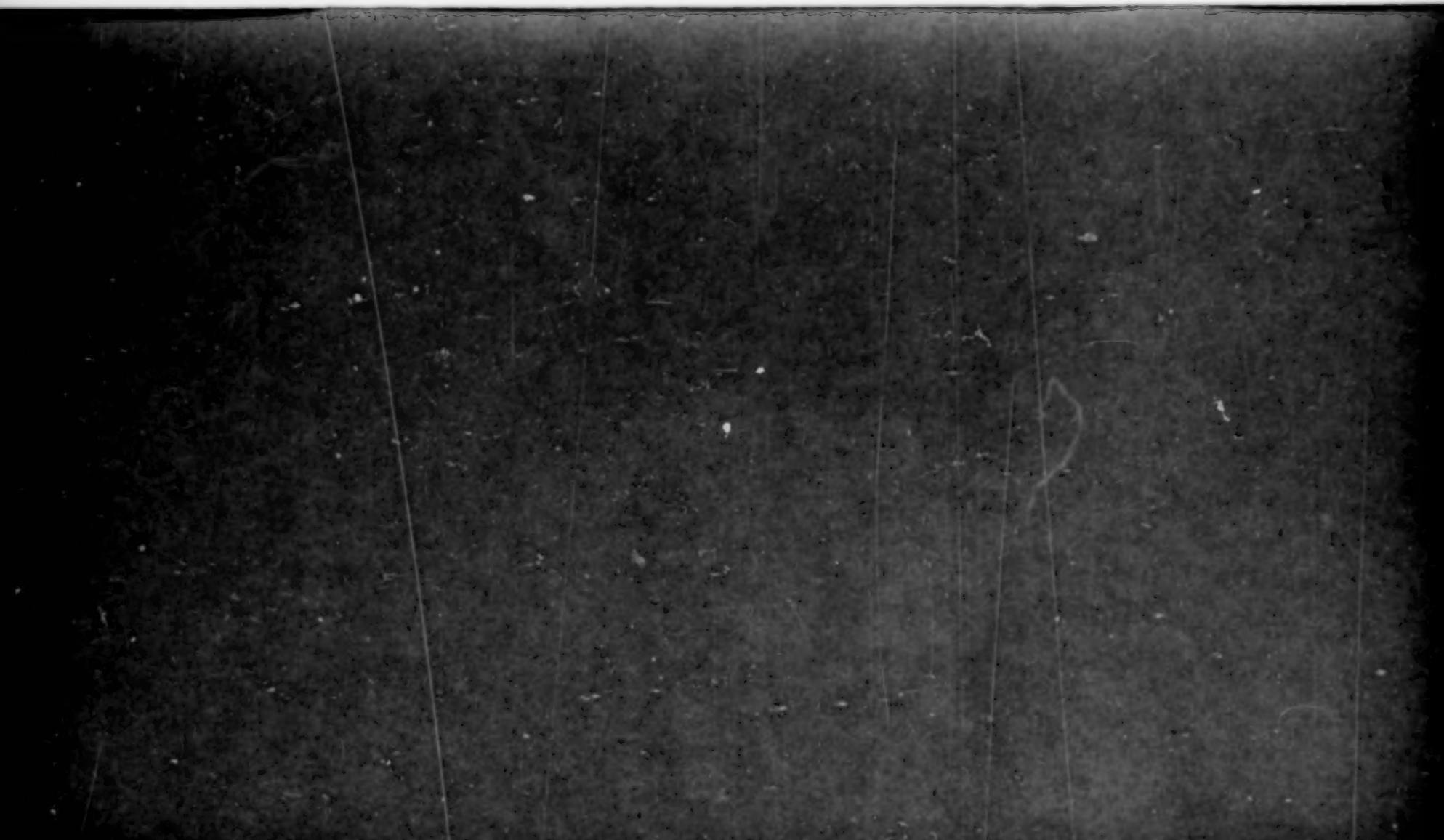

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS WHY THE WRIT SHOULD BE DENIED	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. A convicted but unsentenced defendant retains Fifth Amendment rights with regard to unrelated criminal activities or other matters which may result in enhancement of his or her sentence or future prosecutions	2
II. Neither the decision below nor the record raises the question whether a probation officer must give *Miranda* warnings to an incarcerated, unsentenced defendant before a presentence investigation interview	3
III. The decision below is a correct application of law to the facts	4
CONCLUSION	5

TABLE OF AUTHORITIES

CASES Page

Baumann v. United States, 692 F.2d 565, 577 (9th Cir. 1982) 3, 4
Burch v. State, 450 N.E. 2d 528, 530 (Ind. 1983) 2, 3, 4
Estelle v. Smith, 451 U.S. 454 (1981) 3, 4
In re Wayne H., 156 Cal. Rptr. 344, 596 P.2d 1 (Cal. 1979) 2
Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982) 3
Minnesota v. Murphy, 465 U.S. 420, 429 (1984) 2
People v. Williams, 454 N.E. 2d 220, 242 (Ill. 1983) 4
United States v. Johnston, 286 U.S. 220, 227 (1925) 4
United States v. Miller, 771 F.2d 1219, 1235 (9th Cir. 1985) 2
United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978) 2
United States v. Wilson, 598 F.Supp. 138, 142 (E.D. Pa. 1984) 2

CONSTITUTIONAL PROVISION

Fifth Amendment, United States Constitution 1, 2, 3, 4

IN THE

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OCTOBER TERM, 1986

No. 86-1108

STATE OF VERMONT,

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v.

RICK COX,

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On Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Rick Cox, by counsel, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Vermont Supreme Court in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Vermont Supreme Court held only that respondent retained and asserted his Fifth Amendment privilege after his nolo contendere pleas. This holding is in accord

with applicable federal precedent. The court below did not hold that *Miranda* warnings were required before a presentence interview by a probation officer, and thus this question is not presented in this case. The petitioner's objections to the factual conclusions of the court below concerning the voluntariness of respondent's statements are not proper matters for review in this Court.

ARGUMENT

I. A convicted but unsentenced defendant retains Fifth Amendment rights with regard to unrelated criminal activities or other matters which may result in enhancement of his or her sentence or future prosecutions.

The federal privilege against self-incrimination is not extinguished concerning all matters and for all purposes when a defendant pleads nolo contendere or guilty to an offense. A defendant retains his Fifth Amendment privilege to remain silent to prevent enhancement of his sentence or possible prosecution for other crimes. *United States v. Wilson*, 598 F.Supp. 138, 142 (E.D. Pa. 1984); *United States v. Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985); *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978). It is also clear that a state may not compel a convicted defendant to forgo his Fifth Amendment privilege, at least in the absence of some binding assurance of immunity from use in a future prosecution. See *Burch v. State*, 450 N.E. 2d 528, 530 (Ind. 1983); *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984).

This case involves a defendant who asserted his privilege against self-incrimination and was then misled by a state agent into making damaging admissions that were used in sentencing him. Vermont has no case law or statute that prohibits the use of a defendant's statements to a probation officer made during a presentence investigation interview in later prosecutions for other crimes. Compare *In re Wayne H.*, 156 Cal. Rptr. 344, 596 P.2d

1 (Cal. 1979). Thus, even were one to conclude that use immunity from future prosecution discharged the privilege and prevented its assertion by a convicted inmate at sentencing, this limited protection was not available to respondent. The decision of the Vermont Supreme Court that respondent retained a Fifth Amendment privilege after his nolo pleas and that he surrendered that privilege involuntarily is in accord with federal and state precedent. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982); *Burch v. State, supra.*

II. Neither the decision below nor the record raises the question whether a probation officer must give *Miranda* warnings to an incarcerated, unsentenced defendant before a presentence investigation interview.

Petitioner refers in its Question Presented to respondent's "unwarned" statements. Pet. (i). And in its argument, petitioner contends that the Vermont Supreme Court's decision ". . . squarely conflicts with four state appellate decisions which considered the issue of whether *Miranda* warnings need be given prior to the PSI interview." Pet. 8. The petitioner also maintains that ". . . [t]he opinion below is in direct conflict with a Ninth Circuit case, *Baumann v. United States*, in which a panel of the 9th Cir. held that 'neither *Estelle* * itself, nor the general principles announced in *Miranda*, require that a convicted defendant be warned of his right to counsel and his right to remain silent prior to submitting to a routine, authorized presentence interview.'" Pet. 9.

However, the Vermont Supreme Court did not hold that respondent was entitled to *Miranda* warnings before his interview with the probation officer. The court below decided only that "the sentencing judge relied on statements in the PSI that were taken after [respondent]

---

* *Estelle v. Smith*, 451 U.S. 454 (1981).

asserted his Fifth Amendment privilege against self-incrimination, and that he made the statements involuntarily." Pet. 2a. Therefore, this case does not present an appropriate vehicle for exploration of the question presented by the petitioner, however important that question may be.

III. The decision below is a correct application of law to the facts.

Respondent maintains that the Vermont Supreme Court's decision is correct in both law and fact. It is noteworthy that one of the cases cited by petitioner—*Burch v. State*, *supra*—as in conflict with the decision below was actually relied upon by the Vermont Supreme Court in support of its decision. *Burch* and other cases cited by petitioner support the proposition that a convicted defendant has a right to remain silent when interviewed by a probation officer and that this right may not be impaired by coercive or misleading tactics. *Burch v. State*, *supra*, at 530; *People v. Williams*, 454 N.E. 2d 220, 242 (Ill. 1983); *Baumann v. United States*, 692 F.2d 565, 577 (9th Cir. 1982); *Estelle v. Smith*, 451 U.S. 454, 463 (1981).

Respondent maintains that the facts of record support the Vermont Supreme Court's findings that respondent's statements were made involuntarily in violation of the Fifth Amendment. In any event, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 286 U.S. 220, 227 (1925).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

Dated: February 4, 1987

Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED ON JANUARY 2, 1987
CERTIORARI GRANTED ON FEBRUARY 23, 1987

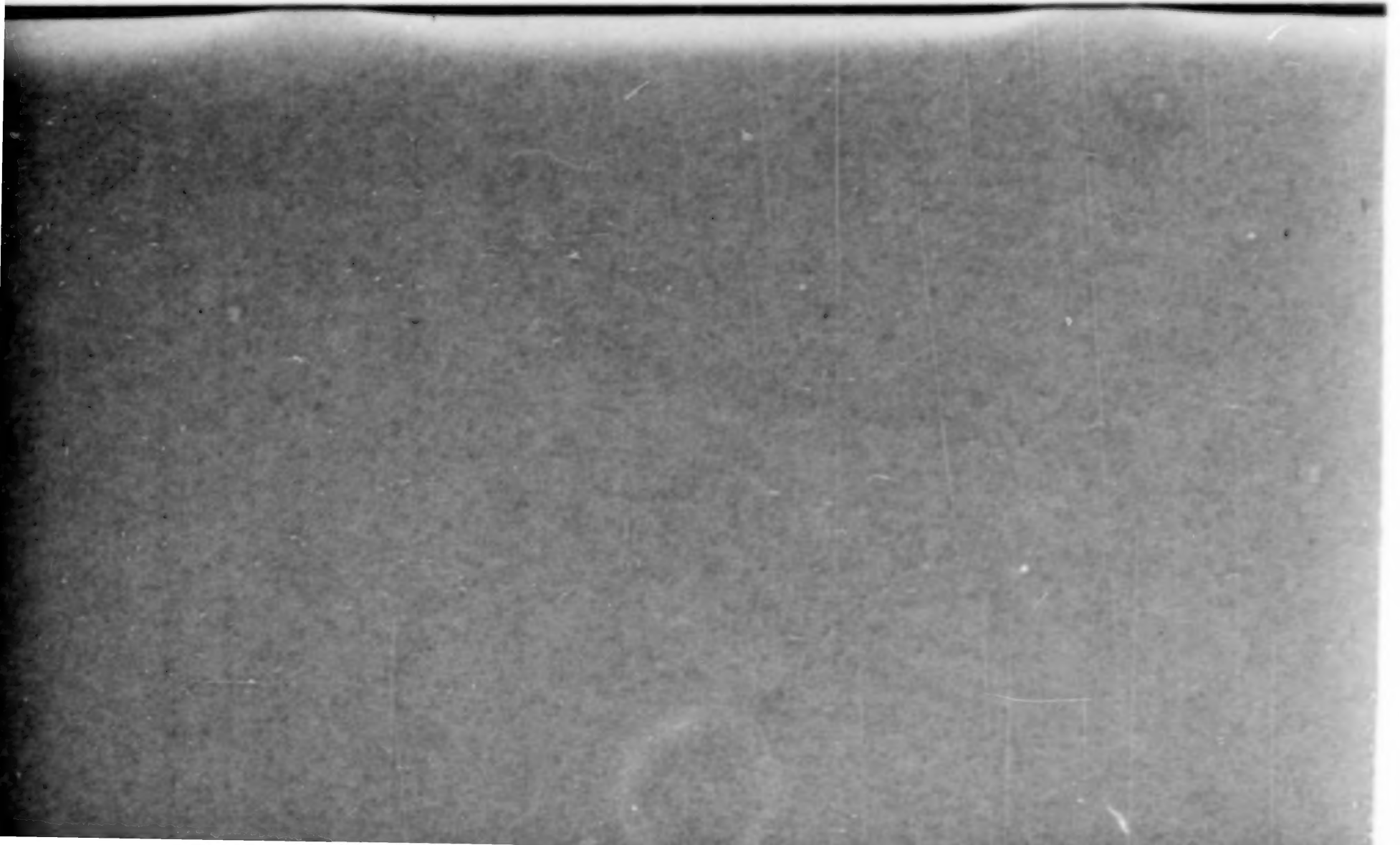

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
INFORMATION	2
AFFIDAVIT	4
MOTION TO AMEND INFORMATION	7
SENTENCING TRANSCRIPT	9
MOTION TO REARGUE	25

NOTE: The following opinion and orders have not been included in this joint appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Opinion and Order of the Vermont Supreme Court	1a
Order of the Vermont Supreme Court denying motion to reargue	8a

RELEVANT DOCKET ENTRIES

State of Vermont vs. Rick Cox
District Court of Vermont, Unit II, Chittenden Circuit
Docket No. 3044-8-83 CnCr

Date	Proceeding
8/14/83	Probable Cause found on original felony charges;
9/16/83	Not Guilty Pleas entered at arraignment;
12/06/83	Motion to Amend Information filed by State of Vermont;
12/09/83	Motion to Amend Information granted; Charges reduced to misdemeanors; Nolo contendere pleas tendered; Adjudication of Guilty entered; Presentence report ordered;
1/25/84	Defendant sentenced to 3 consecutive jail terms of 6 mos.-12 mos. for each count;
2/22/84	Notice of Appeal filed.
	Vermont Supreme Court Docket No. 84-105
9/17/85	Oral argument before Full Court following filing of briefs;
10/10/86	Entry order and opinion filed: "Sentence vacated. The PSI report is to be stricken from the file; case remanded for preparation of a new PSI report and resentencing before a trial judge who has not reviewed the stricken presentence report.";
10/24/86	Motion to reargue filed by State of Vermont;
11/03/86	Motion to reargue denied;
11/10/86	File returned to trial court.

STATE OF VERMONT
DISTRICT COURT OF VERMONT
UNIT II, CHITTENDEN CIRCUIT

Docket No. 3044-8-83 CnCr

STATE OF VERMONT

v.

RICK COX

INFORMATION BY STATE'S ATTORNEY

BY THE AUTHORITY OF THE STATE OF VERMONT,

State's Attorney for said County, upon his oath of office, charges:

That RICK COX of unknown in the county of unknown at Burlington in the County of Chittenden and in said Territorial Unit on the 14th day of August, 1983

WAS THEN AND THERE A PERSON WHO, WITHOUT LEGAL AUTHORITY, FORCIBLY CONFINED ANOTHER PERSON WITHIN THIS STATE, AGAINST HIS WILL, TO WIT: JOHN WILLIAMS, HEIDI HILDEBRANTT, AND MARC DAGOSTINO

PENALTY: Imprisonment of not more than 25 years, or fine of not more than $10,000.00, or both.

In violation of Title 13 V.S.A. § 2401

and against the peace and dignity of the State.

/s/ Susan Fowler
State's Attorney

Dated: 08-14-83

This information has been presented to me and I have found probable cause, this 14th day of August, 1983

/s/ Edward J. Cashman
District Judge

STATE OF VERMONT
DISTRICT OF VERMONT
UNIT II, CHITTENDEN CIRCUIT

(Title Omitted in Printing)

STATE OF VERMONT)
) ss.
COUNTY OF CHITTENDEN)

AFFIDAVIT OF PROBABLE CAUSE FOR ARREST

Now comes Cpl. Jay J. Morris, affiant, being duly
(Officer)
sworn and on oath deposes and says he has probable cause to believe that Rick Cox has committed the crime
(respondent)
of Kidnapping, in violation of T 13 V.S.A. 2401

(A) On 08-14-83 at approximately 0611 hours, affiant was detailed to investigate a reported kidnapping.

(B) Affiant met with the victim, John Williams, who related that a male had been in his (Williams') vehicle along with two other friends. At approximately 0245 hours, while Williams was driving the vehicle east on Flynn Avenue near Pine Street in Burlington, the male, known only as Rick, removed a 9mm pistol from the rear of the vehicle, loaded same, and pointed the barrel at one of the occupants, Heidi Hildebrantt.

(C) The male had just prior been arguing with Williams over a debt, and stated "Give me the money, or I'm going to shoot her first". He cocked the pistol.

(D) The male then pulled Williams' head back by the hair, and stuck the pistol barrel into Williams' throat. Williams asked the male if the two could settle the matter alone, allowing the other two passengers to leave, and he replied in the negative.

(E) Williams indicated that Hildebrantt was pleading to be allowed to leave, and the male responded that if anyone in the vehicle tried to leave the vehicle, they would be shot.

(F) Williams indicated that he also wanted to leave the vehicle, but was threatened with being shot if he attempted to do so.

(G) The male continued his threats and demands for a period thought in excess of two hours, the entire time against their desires to leave.

(H) Williams advised that the last name of the subject was unknown, but that he knew that the subject had been living at the Mapleleaf Motel on Shelburne Road in South Burlington in room #9. He further related that the subject's girlfriend and roommate was Nancy Champagne, a person known to him personally.

(I) A check with the South Burlington Police revealed that Champagne had been staying in the aforesaid room with a Rick Cox. They had been called by Champagne to investigate a "domestic complaint" involving Cox and Champagne on 08-12-83.

(J) A check with the Vermont State Police revealed that Champagne had filed a complaint with them against Cox earlier in the week. She had advised at that time, that Cox was her roommate at the aforesaid room.

(K) Cox, the Respondent, fits the physical description given by Williams, Hildebrantt, and the other

passenger, Marc Dagostino, as compared with the description given by the police officers that met with Cox days prior.

(L) Both Hilderbrantt and Dagostino told affiant that they were held against their will, and felt that had they tried to leave, they would have been harmed by Cox.

(Affiant) /s/ Cpl. Jay J. Morris

Subscribed and sworn to before me on 08-14-83, at Burlington, VT

/s/ [Illegible]
Notary Public

STATE OF VERMONT
DISTRICT COURT OF VERMONT
UNIT II, CHITTENDEN CIRCUIT

(Title Omitted in Printing)

STATE OF VERMONT

v.

RICHARD COX

MOTION TO AMEND INFORMATION

NOW COMES the State of Vermont through its Deputy State's Attorney and moves to amend the information on the above-captioned case. • • •

The amended information would allege three counts, as follows:

COUNT I:

Was then and there a person who, without legal authority, attempted by physical menace to place another in fear of death or serious bodily injury, to wit: John Williams, in violation of Title 13 V.S.A. § 1023(a)(3).

PENALTY: 1 year or $1,000.

COUNT II:

Was then and there a person who, without legal authority, attempted by physical menace to

place another in fear of death or serious bodily injury, to wit: Heidi Hildebrandt, in violation of Title 13 V.S.A. § 1023.

PENALTY: 1 year or $1,000

COUNT III:

Was then and there a person who, without legal authority, attempted to place another in fear of death or serious bodily injury, to wit: Marc Dagostino, in violation of 13 V.S.A. § 1023(a)(3).

PENALTY: 1 year or $1,000.

The State respectfully requests this amendment because the strength of the kidnapping charge on each individual varies and must stand or fall on its own merit. This information was not known by the State until depositions of the victims were held on December 3, 1983.

DATED this 6th day of December, 1983.

Respectfully submitted,

/s/ Susan Fowler
SUSAN L. FOWLER
Chief Deputy State's Attorney

cc: Public Defender

STATE OF VERMONT
DISTRICT COURT OF VERMONT
UNIT III, CHITTENDEN CIRCUIT

(Title Omitted in Printing)

STATE OF VERMONT

vs.

RICHARD COX

SENTENCING

January 25, 1984

Before: HONORABLE PAUL F. HUDSON

APPEARANCES:

Susan Fowler, Deputy State's Attorney, on behalf of the State of Vermont.

Jane Watson, Chittenden County Public Defender, on behalf of the Defendant.

Diana Agnew, Chittenden County Public Defender, on behalf of the Defendant.

JANE WORTHEN-SMITH, RPR, CM
Official Court Reporter
Vermont District Court
39 Pearl Street
Burlington, Vermont

[2] THE COURT: The matter before the Court is State of Vermont versus Richard Cox. This case is on Docket 3344-8-83 [*sic*]. Mr. Cox is before the Court this afternoon with his attorney, Jane Watson and Diana Agnew. State's represented by Miss Fowler; and the matter is here for sentencing on three counts of simple assault.

The Court has received a presentence report authorized by Diane Farley. Court also notes a letter of objection to the report filed by Miss Watson on today's date. Miss Watson, the Court will hear you with regard to the objections that you raise as to the report and we'll then hear a response from the Deputy State's Attorney.

MS. WATSON: Your Honor, as I indicated to you earlier, I didn't bring the Rule with me, and I was unable to find a copy in the Clerk's office. However, to the best of my recollection, the Rule makes provision for the Defendant to meet any objection that he has. And perhaps the Rule does not call for exactly what the possibilities are for the presentence investigation report to be rewritten, but I think the spirit of the Rule indicates that there is certainly space for additional time and opportunity to point out any objections or shortcomings of the presentence investigation report.

THE COURT: Oksy [*sic*]. Do so now.

[3] MS. WATSON: I would like to make a letter that I submitted today a part of the record by virtue of incorporating it into this hearing. We object to the presentence investigation report for numerous reasons.

We have listed in detail those part of the report which we believe are violations under *State versus Williams.* In addition to that, we believe that were those stricken that would be left of the report would be very misleading to a judge who would view it with the many gaps it would have. And in addition, that the overall tone of the report is objectionable.

The power of the written word is a fairly awesome power, and updoing [*sic*] the kind of bias that has been

presented in the presentence investigation report we believe is nearly impossible to do. I will address those portions that we think are *Williams* at the end. But aside from that, we would point out that the offense summary and the victim's version have been lifted from a police report. It is interesting to us that the only victim who is quoted in this—there were allegedly three victims. We deposed two of the three victims, and the only one who is quoted in this report is the one who failed to respond to subponea for deposition. The other two were subpoenaed, appeared, and the depositions [4] are available for those two people. In addition, we know that those two people —how those two people feel about the sentencing, because as the Court can see, we have attached affidavits from them. Beyond that we know that at least one of them is Miss Hildabrand, was in fact contacted by the probation officer and that fact or any result of a conversation is not included in the presentence investigation.

THE COURT: You may call this afternoon if that's what you decide to present to the Court.

MS. WATSON: We think it's interesting that the one victim's version is without any personal interview. It is verbatim what we have presented in the police report without the opportunity to depose this person. In addition to that, with respect to employment, we have contacted personally ourselves the employer and it is our understanding from him that at the time he was contacted by the Probation Department he could not remember Rick Cox and subsequently discussed it with his present employees, and then did remember Rick Cox and made certain statements about Mr. Cox to us so that what stands in the presentence investigation report indicates that our client was not truthful about former employment when in fact he was; and the employer now recollects that and would in fact have a statement to make [5] about what he remembers and the nature of that employment. So it is inadequate in that way.

THE COURT: That's not necessarily Miss Farley's fault that the employer suffered from a bad memory, but I will accept as a matter of correction that he does not recall Mr. Cox being in his employment. Do I gather that was a successful employment?

MS. WATSON: As far as we can tell from his comments it was.

THE COURT: Good. Okay.

MS. WATSON: With respect to the *Williams* material, those are listed at Page 2 under "Defendant's Version," the second paragraph; the second and fourth sentences contain allegations of criminal activity that have not been proven.

Paragraph Five, the third and fourth sentences do the same. At Page 3, still "Defendant's Version," the second paragraph and the second sentence indicates the same thing. Paragraph 7 of the entire paragraph and Paragraph 9 under "Defendant's Version," are such that to what exactly would constitute unproven crime, the whole paragraph would have to come out.

Page 5 under "Law Enforcement Official's Statement," again the reference to criminal conduct not proven.

[6] THE COURT: Rest assured on the officer's official statement, Miss Watson, that that is excluded. It's hearsay. It's speculation, and I won't consider it anyway.

MS. WATSON: Is that with respect to both paragraphs?

THE COURT: You bet.

MS. WATSON: On Page 6 under "Other Convictions," the first, second, third, and fourth paragraphs include things which are not convictions to our knowledge.

THE COURT: Let me just address at this point to Miss Farley. You have listed, Miss Farley, convictions March '73, December '74, January and April '77. Are those simple arrest records or are those all convictions with the penalty that was imposed?

MS. FARLEY: The offenses that are listed are actual convictions. It's an incomplete record, and the offenses listed above that's what I received from—no date, no convictions. That has not been completed as to this day.

THE COURT: You don't have any simple arrest record, information, it's all conviction data?

MS. FARLEY: The ones that are listed are the ones that are verified convictions.

[7] THE COURT: Do I gather Missouri for common assault, April' 77, there is no disposition other than guilty plea?

MS. FARLEY: Right. There was a guilty plea entered on the record.

THE COURT: So essentially that's a case pending since?

MS. FARLEY: I don't know if you assume that, but—

THE COURT: Okay, thank you. You may proceed, Miss Watson.

MS. WATSON: So my understanding is that the only things that are verified convictions are the things that appear under the heading, "Date, Source, Offense and Disposition"? Is that your understanding from what Miss Farley said?

THE COURT: That's my understanding that those are all for conviction record, not arrest record which are prohibited by standard 2.5 of the ABA standards in sentencing; and are, by the way, very much part of *Williams* decision.

MS. WATSON: So that the material in the first four paragraphs would be subject to deletion?

THE COURT: No. Be probably included in this report.

[8] MS. WATSON: Those things listed in the second paragraph are not verified convictions.

THE COURT: I understand they are.

MS. WATSON: We have no way of knowing.

THE COURT: Miss Farley? Is that from a conviction?

MS. FARLEY: Your Honor, it may clarify matters to tell you what I have available to me. This is what is in the record. I received a record check from Missouri which I have in which this paragraph is deleted from the actual form. I rewrote to them asking for confirmation whether these were arrests or convictions. To my knowledge I don't know which ones were arrests or convictions except for the ones that are listed that was confirmed via FBI report.

THE COURT: Okay. So that is conviction data. Proceed, Miss Watson.

MS. WATSON: Well, your Honor, my understanding of what she said was that those offenses listed in the second paragraph are not verified convictions.

THE COURT: Proceed.

MS. WATSON: In addition to that one of the ones that is listed as a verified conviction is one which after completion of probation found to us from our client to be something akin to our deferred [9] sentence here so that the completion of the probation should have brought about the expungement of a conviction. which would be the one dated the 12-16-74.

THE COURT: We won't consider that. Anything further with the paragraphs that you set forth in your letter of objection, Ms. Watson?

MS. WATSON: At Page 8F which is "Alcohol and Drug Usage," the fifth paragraph beginning in its entirety refers to criminal conduct not proven. Page 8 under "Leisure Activities," I would believe that both of those paragraphs should be stricken because they are surmise and gossip with no substantiation. As a matter of fact, our client tells us that the Probation Officer called him after her visit and asked him specifically if he was associated with the motorcycle group, and he told her, no, he was not.

THE COURT: I have deleted that myself, Miss Watson. I don't know that that type of relationship bears directly on sentencing, and I have already deleted it myself from further consideration. Okay?

MS. WATSON: At Page 9, Roman numeral V "Assessment and Recommendation, paragraph 2, the second sentence contains allegations of criminal conduct not proven. Page 10, still "Assessment and Recommendation," fifth paragraph under that heading—not on the page but the fifth [10] paragraph under that heading, the second sentence and the entire paragraph, sixth paragraph, seventh paragraph and ninth paragraph includes again reference which relates back to all of the other parts of the presentence that we believe are objectionable under *Williams*.

In addition to taht [*sic*] I might tell the Court that when the Probation Officer came to interview our client we in fact arranged for our investigator to go down and talk with him to prepare him for what would be coming forward, and he indicated to the Probation Officer that he really didn't want to talk to her until Paul Kelley was there, who is the investigator on the case. And she indicated to him that that was fine but she wouldn't come back again. And made him feel as though he would have no opportunity to consult with us before talking with her. So that much of the material which has been included in violation of *Williams* are things that our client would have been advised about had he had an opportunity to speak with us first.

And I would also note that attached beside the affidavit is a letter from a man in the Corrections of St. Louis County who is quoted in the presentence investigation, and I think if you just are overall objection to the nature of this report and the necessity for having it prepared so that it is an unbiased [11] document is shown with reflection to the difference between the man's own letter which has not been added in any way and what has been placed in the presentence investigation

report. The letter is a good deal more positive than the quotation of his comments by the Probation Officer. So I guess the long and the short of it is that we think that there is material that is clearly objectionable under *Williams*; and that the nature of the entire thing is such that that Mr. Cox cannot have a fair sentencing on this presentence investigation report. And as my letter points out, this is something that I personally have rarely requested in six years or so that I practiced in this court, I have only once before that I can recall requested this, and I think that again I'm in a position where my client's best interests it's necessary to do.

THE COURT: Miss Fowler?

MS. FOWLER: Your Honor, I have looked over the items that Jane had asked to have stricken as we went over them. Our position would be for the most part that with respect to pages 2 and 3 the "Defendant's Version," those are admissions as we would feel that those should not be stricken. The Court has already struck from the record Page 5, the law enforcement official's statement. The other conviction, while the Court indicates those may be included, we would have no objection to [12] striking that portion of the report which does not list disposition as well. That is the last, the six convictions which are listed out of date and sort and offense of disposition we feel there is absolutely nothing wrong with those. I believe we could include the rest, but we would have no objection to stricking that as well. The offenses include paragraph 1 to where it lists a string of offenses, of course, it's up to the Court, but that would be our position.

THE COURT: We'll excise that portion. [*sic*] and would only deal with the specific cases where there is a disposition that appears that Miss Farley's indicated was confirmed by Missouri and by FBI record check which is certainly sufficient verification.

MS. FOWLER: On Page 8, paragraph F those are admission once again. And in paragraph G the Court has already omitted the reference to the motorcycle gang.

THE COURT: All right.

MS. FOWLER: And the rest is basically either admissions or the opinion of the Probation Officer which is perfectly admissible in a presentence recommendation with respect to the comments on Page 10.

MS. WATSON: Your Honor, may I just say one other thing?

[13] THE COURT: No, I don't think so. I have heard enough, Miss Watson, and I appreciate your thoughts, but unless there is somethingnow [*sic*] that's been raised by Miss Fowler, let's not go over the same ground.

MS. WATSON: I'm not going to go over the same ground. I'm just going to state what I think amounts to or relates to legal issues; and that is that—and this does come up as to whether or not admission somehow gets by the *Williams* decision. And I think it's clear from our statements that we think they do not, and further, if in fact they do, then I think that it must be Constitutionally necessary for the probation officer who is preparing a PSI to inform as to [*sic*] police officers would tell a defendant his rights he is waiving and what trouble he might get himself into by being fully open and not remaining silent.

THE COURT: Don't you think that's a shared function with his attorney?

MS. WATSON: I don't understand what you mean by shared function.

THE COURT: A person that is represented by counsel who has been convicted of an offense, don't you think it's a shared function with the attorney to be prepared for a conversation with the probation and parole officer about the record?

[14] MS. WATSON: I think that's probably a wise thing for counsel to do. I don't think that it saves the objection or the Constitutional violation. In fact, in this case we attempted to do that and were short circuited.

THE COURT: Okay. The Court has with the time it had available researched the law in the area and con-

sidered your letter, Miss Watson, along with your arguments this afternoon and those of Miss Fowler insofar as with—specifically with reference in the presentence report. I don't think "Law Enforcement Official's Statement," in paragraph E helps much. It's more of an opinion than a statement of fact. I know probation and parole it's customary to contact the investigating officer and on occasion quite valuable material can come forward. I just don't happen to think that has much bearing. I have excluded the reference on Page 6 to certainly of the offenses that appear without disposition information. Balance I have already ruled as appropriate for the Court. Page 8 I excluded the reference to the Pagans. Court sees the balance of this report as being in compliance with *Williams*.

Williams was a case that was written in 1979 when the Supreme Court considered the manner in which John Williams was considered in leud [*sic*] and [15] and [*sic*] lascivious conduct charge, what is essentially conviction information. *Williams* decision is limited in its application to standard 2.3 of the American Bar Association's standard of probation. It is pretty much the basis of the *Williams* decision as this Court sees it. The prohibition of that ABA standard that our Court deems to have adopted is that in presenting a presentence report unproven allegations of arrest information cannot be included in the defendant's criminal record portion of the report. That was my dialogue with Miss Farley a few moments ago. I don't believe in its opinion in *Williams* that our Supreme Court was meant to limit certain other types of information that the Court could consider at sentencing that might include possibility of criminal conduct. I am referring now specifically to another Williams case which is *Williams versus New York*. This is at 337 U.S. 241, 1949 case where Williams was being sentenced for murder committed during the course of a burglary. The sentencing Court considered some 30 other burglaries that he had been involved in at the time he was sentenced.

In a very interesting opinion by Justice Black it was indicated to the Court that this information could not only be beneficial to the State, could be beneficial to the defendant because it permitted the Court to set a rational sentence, and there could be a reasonable sentencing plan established [16] when you're dealing with the whole individual rather than with some of the materials being hidden. That consideration, by the way, was under the Fourteenth Amendment of the Constitution. That type of thing is followed in *Greg versus United States*, 394 U.S. 489, 1969 case. It indicated there aren't formal limitations on a presentence report contents. They may rest on hearsay, and they may not necessarily have a bearing on the crimes which the Defendant was charged, broader information. It is followed as well as *U.S. v. Tucker*, 404 U.S. at 443, 1972 case.

As far as the information in this case is concerned, it is particularly germaine [*sic*] to what Mr. Cox is about when the Court considers what is in the report. Appears essentially to be reliable information because it's either information Miss Farley had or that the Defendant has given her. It's in the Court's assessment protected where it has satisfied the due process requirement and has satisfied the ABA standard. Als an opportunity in Rule 32 of the Criminal Rules to protest the report, to present oral testimony to the Court and present argument to the Court, to present any other type of information to the Court that's needed such as the letter I have received from the Defense today and I'm considering in this decision.

[16] [*sic*] With that in mind, with the exceptions noted that have been deleted, the balance of the letter treated as a motion to excise the report is denied.

Now, as far as the tone of the report is concerned, I don't particularly find it distressing. It's not an easy case to write about. Mr. Williams is a complex man. He has problems that other people have, just seems to have them in larger portions at certain times. I don't know

that the view of this matter as being biased presentence report is at all well taken. As a matter of fact, the Court does not agree with counsel's view of it. Court is not in counsel's position either. Going to deny the request insofar as it is asking for rewrite of the presentence report, because I think it satisfies the statute in the State of Vermont as to the preparation of the report; and it satisfies the Rules of Criminal Procedure.

With that in mind, are counsel prepared to proceed with sentencing?

MS. FOWLER: Yes, your Honor.

THE COURT: Okay, Miss Watson, are you prepared?

MS. WATSON: Yes. The recommendation, your Honor, that we're making for sentencing is essentially [17] the recommendation made by the two alleged victims here who were deposed, whom we got to see face to face, and who are willing to talk with us about what they thought was appropriate, they being in the most grave position to this incident. They feel the amount of time which Mr. Cox has already served, which is significant, comes to something like, something in the area of six months, is sufficient punishment from their standpoint.

I would also point out to the Court that the other letter which we have submitted from the Deputy Chief of Custody at the St. Louis County where Mr. Cox spent some time before indicates that—well, I think it's interesting that there were no institutional infractions and insofar as none are reported here in Chittenden County. In addition he was in this case released on his own recognizance, and apparently in this experience just did not display any bitterness toward the criminal justice system.

I also point out that since the Court is taking into consideration the material that we find objectionable with respect to drugs, that the Court should give serious consideration to the statement of Mr. Cox himself about

that. And I think he makes a pretty flat statement to the probation officer that he has really had it with that particular kind of lifestyle and [18] really wants not to be involved at all with drugs any more. That, in conjunction with the kind of attitude which has been observed by someone who has been in close association with him in corrections leads me to believe that he has the kind of attitude and certainly the intellectual ability, and he seems to have the intellectual ability in terms of conversations that I have had with him to be one who can take advantage of what we have available in terms of dealing with those kinds of problems. He also is in fact a person who has been able to maintain employment and while we already pointed out to the Court that the report is incorrect, that in fact he works as he said he did, in Florida before coming here and the report does include in his past before that employment. So while he has had some scrapes with the law throughout his life, it is clear that the use of drugs has probably been the major problem in terms of his conduct, because he seems to otherwise have all of the facilities that one needs to live a lawful life.

In addition, our cilent has been attending the AA meetings which are available at the Correctional Center while he has been detained there. So for all of those reasons we believe that what the victims suggest is a reasonable sentence and that Mr. Cox be sentenced to a sentence which in composite of the three [19] charges would amount to a six month minimum and a nine month to one year maximum with the balance of the sentence beyond for credit for time served be suspended with special condition for treatment.

THE COURT: Thank you. Mr. Cox, anything that you have to say in your own behalf?

THE DEFENDANT: No, sir.

THE COURT: Nothing? Miss Fowler?

MS. FOWLER: Your Honor, this is a complicated case as the Court may have gathered from reading the

presentence investigation. It was my case, and I was relatively involved with it from the beginning. It began as a kidnapping case. After speaking with the victims a number of times and having some contact with them, it was reduced down to the three counts of simple assault. As Jane indicated earlier while they were happy to speak with me on the phone they were relatively unwilling to get involved with respect to coming in for depositions. One of them failed to appear. The other two did come in and were deposed. It appears that some of this reluctance or hesitance comes from the nature of the entire incident, and that they just as soon forget it as quickly as possible. My feeling about it was that it was a frightening event. He held them essentially at gunpoint for over an hour in a car and they were undoubtedly [20] terrorized at that time. He has six prior convictions which the Court is considering and stated in his report to Miss Farley that in the last nine months he didn't remember not being high on something.

It seems he is fairly well trenched in the habit of using drugs, and while he indicates that he seeks to get out of that type of lifestyle, I sincerely hope that it is true for his sake.

I would ask that he receive a sentence of essentially a year and a half; nine to twelve months to serve on the first simple assault; zero to six months to serve, consecutive, on the second simple assault; and zero to six months concurrent on the third. He does indicate he wants to leave the State as soon as he is released, and I believe that probation's feeling is that they would just as soon have him serve his time and then go on his way as opposed to stay here under the extended probation.

MS. WATSON: For the record, I think it's quite clear that I just want to make it a matter of record, that we do object to going to sentencing on the present report. And beyond that I would just point out that in the deposition of two people who did show up that they did not really indicate that they were terrorized. And

I think that's reflected in what they think is a [21] suitable sentence.

THE COURT: Well, Mr. Cox, if those three people in that car weren't terrorized, they were either immortal or foolish. Nine millimeter is a relatively deadly piece of equipment; and as we all know, that's the basis for the center part of the case.

Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From what some of the things you said that it may have been. This is not a beckoning country for that type of activity. I will conclude my statements in a minute. I certainly am optimistic in some respects from this report that you have decided to change your lifestyle with regard to illicit drugs; because that is part of the sentence, and I intend to recommend drug counseling as appropriate for you, because I do think that you can make progress.

You're a young man. You got an opportunity. You have prior convictions that have suggested to the Court that parole hasn't worked or probation hasn't worked in the past, but there again is an opportunity if you want to turn the corner. I can sit here and and impose any sentence that is within the statute, but it's up to you to decide that this is enough. You have gotten sick of [22] beating your head against the wall. The pain will stop when you quit. Okay? I'm concerned that there be a punishment in your case, because of what has occurred; and I think you probably came here today expecting that. At least you would have been less than candid with yourself if you didn't. I expect that rehabilitation will occur in your case, because that I expect will happen for anyone or at least should. I also expect that as a result of this case there will be some deterrence for you in the future for ever trying to commit this type of offense again, and I certainly hope the public gets the message.

For these three counts of simple assault, Mr. Cox, I commit you on the first count to the Commissioner of Corrections' custody for a term of not less than six, no more than twelve months. On the second count I commit you to a consecutive term of six to twelve months; and the third count I commit you to a consecutive term of six to twelve months.

Anything further counsel? There is credit awarded for time the Defendant has been held in custody.

MS. FOWLER: No, thank you, your Honor.

THE COURT: Okay, you're remanded to the Commissioner's custody.

(Certificate Omitted in Printing)

IN THE SUPREME COURT OF THE
STATE OF VERMONT

Supreme Court Docket No. 84-105

STATE OF VERMONT

v.

RICK COX

MOTION TO REARGUE

The State respectfully requests the Court, pursuant to V.R.A.P. 40, to reexamine its decision in the above-captioned cause. The State submits that the Court has misapplied the extent of the Fifth Amendment protections. The State further argues that, in light of the absence of any evidentiary record at the sentencing hearing, the case should be remanded to the lower court in order to permit testimony from, among others, the probation officer and the defendant concerning the interrogative procedures employed.

The law is well settled that the Fifth Amendment protections bar the use of incriminating responses in future criminal proceedings. See, for example, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) and *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). The Appellee respectfully contends that under the facts of this record the privilege against self-incrimination does not apply to the sentencing stage of this prosecution. Reliance on *Estelle v. Smith*, 451 U.S. 454 (1981), is unavailing since any enhancement to sentencing here is radically different from that obtained in a capital case when the death penalty may be the ultimate outcome. Such enhancement does not come into play in a more typical criminal prosecution. For example, see *Baumann v. U.S.*, 692 F.2d 565, 576 (9th Cir. 1982).

> We conclude that there is a substantial difference between a psychiatric examination of the defendant in a capital case which seeks to elicit evidence from the defendant relating to the critical aggravating factor of dangerousness, and a "routine" presentence interview, see *Estelle*, supra, 451 U.S. at 465, 101 S. Ct. at 1874, restricted to gathering information upon which the District Court, in its discretion, may rely when imposing sentence.

Baumann v. U.S. at 576.

That Court appropriately observed the narrow reach of the *Estelle* decision regarding the High Court's interpretation of the Fifth Amendment in a death penalty case. Specifically, see, *Estelle v. Smith*, at 469 n. 13 ("Of course, we do not hold that the same Fifth Amendment concerns are necessarily present by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.")

Should the Court find the privilege against self-incrimination applicable to the sentencing phase of this cause, the record insufficiently demonstrates the extent, if any, of pressures exerted by the probation officer during the interview. Contrary to the record set forth in *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982), where the Court clearly found an imperative to cooperate and respond to questioning by the probation officer, as well as a showing of questions regarding the underlying crime as well as other additional criminal activity, in this case the record is devoid of any evidence regarding interrogative tactics employed by the probation officer. All that was asserted at the sentencing hearing was a belief on the part of defense counsel that the defendant wanted to speak with an investigator prior to participating in the presentence investigation interview. Given the probable scope of the questions discussed in the interview, i.e. employment history, family history and the like, the Court is without any guidance in terms of knowing what, if any, statements were made by the defendant on a volun-

tarily basis and what questions, if any, were posed by the probation officer.

In light of the defendant's right of allocution afforded under V.R.Cr.P. 32(a)(1)(C), the defendant lost nothing by a cessation of the interview process. Consequently the Court is in error when it implies that the defendant's sole opportunity to express himself was limited to the interview session conducted by the probation officer. See *State v. Cox*, Slip Op. 84-105 at p.5.

The Court is also directed to *Burch v. State*, 450 N.E. 2d 528 (Ind. 1983), a case relied on by this Court in this decision. While the Court referred to the *Burch* decision in part, it apparently overlooked that court's view that the presentence investigation interview did not involve apparently coercive pressures. The Appellee maintains that on this record there is no basis on which the Court can find such pressures confounded the Appellant and forced him to admit to other criminal activities.

Based on the foregoing, should the Court determine that the privilege against self-incrimination does apply to this proceeding, it is respectfully submitted that the Court must remand the cause in order to determine what occurred at the presentence investigation interview. Alternatively, a remand would be appropriate to ascertain to what extent, if any, the defendant's remarks played a part at sentencing.

Respectfully submitted,

Dated: October 24, 1986

STATE OF VERMONT

JEFFREY L. AMESTOY
ATTORNEY GENERAL

by: /s/ Susan R. Harritt
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Supreme Court, U.S.
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No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination is violated by the use of a defendant's unwarned statements in a presentence investigation report, when consideration of the statements at the sentencing hearing did not expose the defendant to an enhanced penalty or provide a basis for future prosecution of other crimes?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
1. Summary	2
2. Pertinent Factual Background	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. Without Compulsion, There Was No Violation Of The Fifth Amendment Privilege	8
II. Where The Government Had No Different Burden Of Proof And Where There Was No Greater Penalty Facing Defendant, The PSI Could Not Effect Any "Enhanced" Punishment Within The Meaning Of *Estelle*	10
III. The Policy And Purposes Underlying The Privilege Do Not Support Its Application To The Presentence Interview	12
A. Aims Of The Privilege	12
B. The PSI And The Individualized Sentence	14
C. Future Remedies	16
IV. The Fifth Amendment Privilege Against Self-Incrimination Was Not Intended To Impede The Flow Of Information Used At Sentencing	17
V. Miranda Warnings Are Not Required In The Non-Coercive Presentence Investigation Interview	20
CONCLUSION	25

TABLE OF AUTHORITIES

CASES — Page

Baumann v. United States, 692 F.2d 565 (9th Cir. 1982) 18, 22, 23
Baxter v. Palmigiano, 425 U.S. 308 (1975) 13
Booth v. Commonwealth, 675 S.W.2d 856 (Ky. 1984) 23
Burch v. Indiana, 450 N.E.2d 528 (Ind. 1983) 11, 23
Commonwealth v. Burton, 451 Pa. 12, 301 A.2d 675 (1973) 23
Estelle v. Smith, 451 U.S. 454 (1981) ..... *passim*
Fisher v. United States, 425 U.S. 391 (1975) 18
Garner v. United States, 422 U.S. 648 (1975) 21
Garrity v. New Jersey, 385 U.S. 493 (1967) 17
Gault, In re, 387 U.S. 1 (1967) 14
Gibson v. State, 110 Idaho 631, 718 P.2d 283 (1986) 19
Hale v. Henkel, 201 U.S. 43 (1906) 13
Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978) 11, 19
Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982) 20
Kastigar v. United States, 406 U.S. 441 (1972) 16
Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 9
McCarthy v. Arndstein, 266 U.S. 34 (1922) 14
Mempa v. Rhay, 389 U.S. 128 (1967) 13
Michigan v. Tucker, 417 U.S. 433 (1973) 8
Minnesota v. Murphy, 465 U.S. 420 (1984) 7, 8, 9, 21
Miranda v. Arizona, 384 U.S. 436 (1966) 20, 21, 24
Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 12, 13, 16
People v. Bachman, 127 Ill. App. 3d 179, 468 N.E.2d 817 (1984) 23
People v. Santana, 184 Cal. Rptr. 733, 134 Cal. App. 3d 773 (1982) 23
Roberts v. United States, 445 U.S. 552 (1980) 24
Selby v. Shulsen, 600 F.Supp. 432 (D. Utah 1984) 19
Solem v. Helm, 463 U.S. 277 (1983) 13
State v. Cawley, 133 Ariz. 27, 648 P.2d 142 (1982) 22
State v. Chambers, 144 Vt. 377, 477 A.2d 974 (1984) 9
State v. Cox, 147 Vt. ——, 519 A.2d 1144 (1986) 1

TABLE OF AUTHORITIES—Continued

	Page
State v. Heffran, 129 Wis. 2d 156, 384 N.W.2d 351 (1986)	23
State v. Knapp, 111 Wis. 2d 380, 330 N.W.2d 242 (1983)	22
State v. Mercier, 128 N.H. 57, 509 A.2d 1246 (1986)	19
Taylor v. Best, 746 F.2d 220 (4th Cir. 1984)	17
Trimmer v. State, 651 S.W.2d 904 (Tex. App. I Dist. 1983)	23
Trop v. Dulles, 356 U.S. 86 (1958)	13
Ullman v. United States, 350 U.S. 422 (1956)	13
United States v. Booth, 669 F.2d 1231 (9th Cir. 1981)	23
United States v. Gonzalez-Mares, 752 F.2d 1485 (9th Cir. 1985)	19
United States v. Jones, 640 F.2d 284 (10th Cir. 1981)	9
United States v. Tucker, 404 U.S. 443 (1972)	13
United States v. Washington, 431 U.S. 181 (1976)	10
Wasman v. United States, 468 U.S. 559 (1983)	12, 15
Williams v. New York, 337 U.S. 241 (1949)	15

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V	*passim*

STATUTES

18 U.S.C. § 3575	12
21 U.S.C. § 849	12
28 U.S.C. § 1257(3)	2
13 V.S.A. § 11	12
13 V.S.A. § 2401	3
28 V.S.A. § 204	3
28 V.S.A. § 204(c)	14

RULES

F.R.Cr.P. 32	20, 24
V.R.Cr.P. 11	3
V.R.Cr.P. 11(c)(4)	12, 24
V.R.Cr.P. 32	3, 20, 24
V.R.Cr.P. 32(c)(1)(C)	5, 9
V.R.Cr.P. 32(c)(2)	3, 14

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Page
A.B.A. Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-5.1 (Vol. III 1980)	15
A.B.A. Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.3 (Vol. III 1980)	14
Dolinko, Is There a Rationale for the Privilege Self-Incrimination, 33 U.C.L.A. 1063 (1986)	13
Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cinn. L.R. 671 (1968)	13
National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* 1978 § 5.14	15
Partridge, The Sentencing Option of Federal District Judges (Federal Judicial Center, June, 1985 rev.)	15
Schaefer, The Suspect and Society (1967)	13
United States Administrative Office of the U.S. Courts, Probation Division, *The Presentence Investigation Report,* Washington, D.C., U.S. Government Printing Office, 1984	15
Vermont Department of Corrections, *Procedures Manual,* The Presentence Investigation, Procedures, Interim Procedure, 1980	15
8 Wigmore, Evidence §§ 2250, 2251 (McNaughton rev. 1961)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1108

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Vermont is officially reported at 147 Vt. —— and also appears at 519 A.2d 1144 (1986). The opinion is reproduced as Appendix A to the Petition for a Writ of Certiorari. Pet. App. 1a-7a. The order of the Supreme Court of Vermont denying the motion to reargue is reproduced as Appendix B to the Petition. Pet. App. 8a-9a.

JURISDICTION

The judgment of the Supreme Court of Vermont was entered on October 10, 1986. J.A. 1. A timely motion

to reargue was denied on November 3, 1986. J.A. 1. The Petition for a Writ of Certiorari was filed within ninety days of that date and was granted by this Court on February 23, 1987.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, wtihout due process of law. . . .

STATEMENT OF THE CASE

1. Summary

Following the entry of nolo contendere pleas to simple assault offenses, the district court ordered a probation officer to prepare a presentence investigation report ("PSI") on the defendant. At the subsequent hearing, defense counsel objected to the inclusion in the PSI of the defendant's statements to the officer on the grounds that the officer did not first inform the defendant of his Fifth Amendment rights and did not await the investigator from his attorney's office before proceeding with the interview. Counsel argued that the PSI report improperly conveyed to the sentencing judge incriminatory statements allegedly barred by constitutional guarantees. The Vermont Supreme Court, relying in part on *Estelle v. Smith*, 451 U.S. 454 (1981), concluded that the sentencing judge should not have considered the defendant's statements. The State of Vermont obtained review of that decision from this Court on a grant of certiorari on February 23, 1987.

2. Pertinent Factual Background

The defendant was initially charged by information with three felony counts of kidnapping in violation of a state statute, 13 V.S.A. § 2401. See J.A. 1, 2. The trial court judge found probable cause, J.A. 3, based on an affidavit which averred that the defendant had restrained three individuals for over two hours in an automobile against their will, had aimed a 9 mm pistol at two of the car's occupants, and had threatened to shoot them unless a monetary debt was paid. J.A. 4, 5.

Following plea discussions, the prosecutor moved to amend the felony charges, which carried a maximum period of incarceration of 25 years or a fine of $10,000 for each count, J.A. 2, to three misdemeanor counts of simple assault, which carried a maximum period of incarceration of 1 year or a fine of $1,000 for each count. See J.A. 7-8. The trial court granted the motion to amend and the defendant entered three pleas of nolo contendere to the simple assault charges.[1] See J.A. 1.

At the change of plea hearing held on December 9, 1983, the defendant was informed, pursuant to V.R.Cr.P. 11, that by pleading nolo contendere he had waived his privilege against self-incrimination. At that time, the court ordered a routine PSI report[2] for use by the court at sentencing. J.A. 1. The report was prepared and filed with the court. After defense counsel reviewed the PSI, she filed a letter protesting the consideration of the report by the judge at sentencing.

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[1] As noted in the decision below, both the federal courts and Vermont treat a plea of nolo contendere as equivalent to a plea of guilty. See Pet. App. 3a.

[2] The PSI report is prepared by a member of the Department of Corrections in accordance with 28 V.S.A. § 204 and V.R.Cr.P. 32. See Pet. App. 10a, 16a. The report is designed to assist the court "in imposing sentence or in granting probation or in the correctional treatment of the defendant . . . ." V.R.Cr.P. 32(c)(2). See Pet. App. 17a.

The letter was treated by the sentencing court as a motion to excise. The court reviewed the challenged material in the report and struck certain portions, such as the police officer's comments about the victims' fear of reprisal, J.A. 12, unverified or expunged convictions, J.A. 14, 16, and a reference to the defendant's membership in a gang. J.A. 15. The court, however, refused to excise other parts of the PSI, notably the statements from the defendant concerning his drug usage and trafficking. When the report was considered in its edited form, it contained admissions by the defendant regarding his personal and business dealings with drugs.[3] The report also contained a victim's statement reflecting the defendant's involvement and familiarity with drugs as a commercial venture.[4]

Although the trial court invited defense counsel to present evidence, defendant's attorney proffered no evidence regarding her objections to the defendant's "unwarned" statements.[5] The record at the sentencing hearing contained only the unsworn comments of defense counsel, the prosecutor, the judge, and, to a more limited degree, the probation officer. Counsel claimed, in effect, that the defendant was reluctant to speak with the probation officer because he was waiting for defense counsel's investigator to appear. J.A. 15. The defendant did

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[3] The report contains the following summary of statements made by the defendant at the interview: "Cox indicates he came to Vermont from Florida and had brought 2 oz. of Crystal meth with him (or rather sent it to himself via the mail). Cox states he also brought a gun with him." PSI at p. 2. "Cox indicates the money he had came from selling drugs and that he had come to Vermont from Florida to 'get rid' of the 'crystal meth' as he couldn't sell it in Florida." PSI at p. 3.

[4] One victim repeated statements the defendant made during the criminal episodes: "I'm going to shoot both of them too. He goes, this is business. This is the way they do it in business." PSI at p. 4.

[5] Defendant was incarcerated at the time of the PSI interview.

not ask that his attorney be present at the PSI interview. Counsel never argued that the defendant had claimed the Fifth Amendment privilege during the interview.

According to counsel's representations, the probation officer said that it would be fine if Cox chose not to talk with her but she said that the interview could not be postponed. J.A. 15. As reflected in the PSI report, Cox decided to speak with her.[6] No evidence was adduced either from the probation officer or the defendant regarding how the interview was conducted.

After hearing argument from counsel, the trial court questioned defense counsel about her role and responsibility in preparing the defendant for the PSI interview. J.A. 17. The court determined that information supplied by the defendant concerning criminal conduct was relevant to sentencing.[7] The court concluded that, apart from some minor deletions, the remainder of the report "[a]ppears essentially to be reliable information because it's either information [the probation officer] had or that the Defendant has given her," J.A. 19, and that the defendant's due process rights had been fully protected. J.A. 19. Defendant refused the court's invitation to speak on his own behalf. J.A. 21.

The State sought a sentence requiring the defendant to serve nine to twelve months on the first simple assault charge. On the second count, the State recommended a sentence of zero to six months to be served consecutively to the first sentence. On the third count, the State recommended a sentence of zero to six months to be served

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[6] If Cox had refused to be interviewed, the trial court could have dispensed with the PSI. V.R.Cr.P. 32(c)(1)(C).

[7] The sentencing judge opined that "this information could not only be beneficial to the State, could be beneficial to the defendant because it permitted the Court to set a rational sentence, and there could be a reasonable sentencing plan established when you're dealing with the whole individual rather than with some of the materials being hidden." J.A. 19.

concurrently with the second count. In all, the State sought a sentence of nine to eighteen months to be served. J.A. 22. Defense counsel urged the court to impose a sentence of six to nine months with credit for time already served; counsel also sought a special condition requiring drug treatment. J.A. 21. The court imposed a sentence of three consecutive terms of confinement, totalling eighteen months to three years. J.A. 24.

On appeal, the defendant raised a Fifth Amendment challenge. The Vermont Supreme Court struck his sentences and remanded the case for the preparation of a new PSI report and for resentencing. The Court reasoned that, since Fifth Amendment rights are retained by a defendant awaiting sentencing, the defendant may invoke the federal privilege against self-incrimination in order to prevent the possible "enhancement" of his sentence.[8] Pet. App. 4a. The Court also held that defendant's request to speak with an investigator was tantamount to a request for further legal advice. The Court further found that the officer conditioned the availability of the PSI interview on the defendant's waiver of his Fifth Amendment right to silence. The choice to continue with the non-mandatory PSI interview was found to have constituted a compulsion. Pet. App. 5a-6a.

SUMMARY OF ARGUMENT

Consideration by the sentencing court of the defendant's unwarned statements, contained in a presentence investigation report, does not violate the Fifth Amendment privilege against compelled self-incrimination. The privilege against self-incrimination is not violated in the absence of compulsion. The presentence investigation interview provides an opportunity for the defendant to present his version of the criminal offense and to describe his personal background, his motivations, and his special

[8] The Court, however, failed to discuss the nature of the "enhancement".

history. The inquiry is non-accusatorial and non-coercive. As the Court held in *Minnesota v. Murphy*, 465 U.S. 420 (1984), the defendant is under no more than a general obligation, not a compulsion, to cooperate with the probation officer at an interview. The interview setting does not coerce responses from the defendant in violation of the Fifth Amendment, particularly in Vermont where a defendant may choose not to participate.

Similarly, the consideration of the defendant's statements at sentencing does not violate the Fifth Amendment where there is no "enhanced" penalty. Here, after waiver of his right against self-incrimination, the defendant was adjudged guilty. At sentencing, the court considered the defendant's statements and imposed a sentence designed to fit both the crime and the defendant's needs. Where the government had no different burden of proof and where there was no greater penalty facing the defendant, the presentence investigation could not effect any "enhanced" punishment within the meaning of *Estelle v. Smith*, 451 U.S. 454 (1981). Since there was no earlier sentence, it logically follows that, despite the possibility of a higher sentence, there was no possible enhancement.

Unlike the defendant in *Estelle*, this defendant knew that the judge would review the statements he made to the probation officer during the presentence interview. The consideration of these comments is not an affront to the purposes the privilege addresses. Extension of the privilege against self-incrimination and the resultant loss of information from the defendant creates an unwarranted obstacle for the court that seeks to impose an individualized sentence. Likewise, correctional personnel are thwarted, in the absence of a complete presentence investigation, in their attempts to treat, classify, and release the defendant. Given the routine, non-accusatorial and non-mandatory nature of the report and the purposes of the Fifth Amendment, there is no constitutional

reason for the Court to disturb the current presentence investigation practice. Moreover, in light of the future remedies available to the defendant, there is no reason to require a recital of *Miranda* warnings by the probation officer at the presentence interview.

ARGUMENT

I. Without Compulsion, There Was No Violation Of The Fifth Amendment Privilege.

The Vermont Supreme Court erred when it held that the defendant's participation at the PSI interview was unconstitutionally conditioned on the forfeiture of his Fifth Amendment privilege. This view of the record misapprehends both the facts and the law. "Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be compelled to give evidence against himself." *Michigan v. Tucker*, 417 U.S. 433, 448 (1973). Defendant's statements to the probation officer were not compelled since he was merely given a choice of participation or refusal at the interview. Being asked to make a choice is not violative of the privilege against self-incrimination.

This Court has held that there is no Fifth Amendment harm in requiring a defendant to cooperate at an interview with a probation officer. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). The general obligation to appear before a probation officer and answer questions which could result in probation revocation or a subsequent prosecution is not a compulsion automatically calling for the recital of Miranda warnings. *Id.* at 427-429. A probationer, like an ordinary witness under subpoena who must answer or be held in contempt, is not under a compulsion to respond to questions unless he is required to answer over the valid claim of privilege.

Unlike the "penalty" cases, where "the state not only compelled an individual to appear and testify, but also sought to induce him to forego the Fifth Amendment privilege by *threatening* to impose . . . other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.' ", *Minnesota v. Murphy*, 465 U.S. at 434 (emphasis supplied), quoting from *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977), in this case, no such threat was made. Defendant never asserted his privilege against self-incrimination nor was he asked to forgo it.

The choice posed by the probation officer to the defendant presented no compulsion, since in Vermont the defendant can refuse to cooperate with the probation officer at the PSI stage. Pursuant to V.R.Cr.P. 32(c)(1)(C), the court may dispense with the PSI report if the defendant refuses to be interviewed by the probation officer. Refusal to cooperate, however, may result in a waiver of the right to challenge the accuracy in the report. If the defendant fails to correct any allegedly inaccurate material, he cannot challenge a sentence based on the contents of the report. *State v. Chambers*, 144 Vt. 377, 477 A.2d 974 (1984).

While the interview in Vermont is not mandatory, other courts have held that even a required interview does not constitute a compulsion. In *United States v. Jones*, 640 F.2d 284, 289 (10th Cir. 1981), the Court found that, despite the admonition by the trial court to the defendant to cooperate with the studies and interviews scheduled with a psychiatrist, there was no compulsion that rendered his subsequent statements involuntary. Since the government had no substantial reason to believe that the interview process would produce incriminatory disclosures, "[t]he statement of the court to cooperate is certainly not to be regarded as putting undue pressure upon the defendant to make statements which he otherwise would not make." 640 F.2d at 289.

The Fifth Amendment was not intended to "prohibit every element which influences a criminal suspect to make incriminatory admissions." *United States v. Washington*, 431 U.S. 181, 187 (1976). In the absence of any compulsion on the record, even "damning admissions" are not violations of the Fifth Amendment privilege. *Id.* at 187.

II. Where The Government Had No Different Burden Of Proof And Where There Was No Greater Penalty Facing Defendant, The PSI Could Not Effect Any "Enhanced" Punishment Within The Meaning Of *Estelle*.

Although the court sentenced the defendant to a term of incarceration in excess of the parties' recommendations, his sentence was not "enhanced" by the court's consideration of his statements in the PSI report. In view of the defendant's history and the seriousness of his actions while committing the three assaults, the sentence properly reflected what the trial court believed was an appropriate sentence. J.A. 19. On appeal, the Vermont Supreme Court vacated the sentence based on an erroneous interpretation of *Estelle v. Smith*, 451 U.S. 454 (1981).

The case at bar is distinguishable from *Estelle*. In *Estelle*, the defendant challenged, on Fifth Amendment grounds, the admission at the sentencing stage of *pretrial*, unwarned statements made to a psychiatrist. The statements were used by the government to meet its burden of proof at defendant's capital sentencing hearing regarding the element of "future dangerousness". Holding the Fifth Amendment privilege applicable to the "distinct" circumstances presented, the Court stated that the Fifth Amendment was implicated "because the State used as evidence against respondent the substance of his disclosure during the pretrial psychiatric examination." 451 U.S. at 465.

Unlike *Estelle*, the instant case involves no statements made prior to the voluntary entry of pleas of nolo contendere. Moreover, the defendant's statements were not utilized to prove any element of the offense. Even if consideration of the statements led to a lengthier sentence than would have been imposed in their absence, this result was not "enhanced" as that term was used in *Estelle*. Here, there was no prospect of any incremental increase in punishment, regardless of what was elicited from defendant. From the outset, the defendant faced the possibility that the court could sentence him to the maximum penalty simply by virtue of his having committed the offenses. In contrast, in *Estelle*, without his own incriminatory admissions, Smith was ineligible for the death sentence. Furthermore, since the government had no burden of proof at the sentencing hearing, the consideration of respondent's statements did not violate his privilege against self-incrimination. *See, Burch v. Indiana*, 450 N.E.2d 528, 530 (Ind. 1983).

The Vermont Supreme Court failed to state how defendant's sentence had been "enhanced". Assuming *arguendo*, that the sentencing court considered defendant's unwarned statements, the consequence of a more adverse sentence is nonetheless permissible. Certainly, admissions of drug trafficking are proper for a sentencing court's consideration because these comments reveal something about the personality of the defendant. Even if the court meted out a higher sentence because of the defendant's "lifestyle with regard to illicit drugs", J.A. 23, there is no constitutional violation despite the "more severe punishment." *Estelle v. Smith*, 451 U.S. at 475 (Rehnquist, J., concurring), quoting from *Hollis v. Smith*, 571 F.2d 685, 691 (2d Cir. 1978). Consideration of uncompelled statements resulting in an individualized sentence does not create an "enhancement."

Enhancement can arise in several contexts, all of which involve multiple proceedings. A sentence may be "en-

hanced", for example, upon resentencing, when a higher sentence is ordered. *Wasman v. United States*, 468 U.S. 559, 569 (1983). In another context, enhancement takes place when a different penalty replaces a period of incarceration. For example, instead of a term of years, the death penalty is imposed. *Estelle v. Smith*, 451 U.S. 454 (1981). Another illustration of enhancement appears in the repeat offender statutes.[9] Enhancement requires a base line, *i.e.*, once convicted, the defendant is subjected and exposed to a greater punishment if the government meets its burden of proof. In the instant case, there was no pre-existing base line. Here, the defendant had waived his right against self-incrimination. V.R.Cr.P. 11(c)(4). (Pet. App. 11a). His statements were included in a non-accusatory report and considered at sentencing for the crimes for which he had been adjudged guilty. Clearly, under these circumstances, there is no enhancement.

III. The Policy And Purposes Underlying The Privilege Do Not Support Its Application To The Presentence Interview.

A. *Aims Of The Privilege.*

This Court has described the aims of the privilege as a reflection of our most fundamental values. *See, e.g., Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The importance of the privilege, in light of its origins, evolution and function, is not questioned. *See*, 8 Wigmore Evidence §§ 2250, 2251 (McNaughton rev. 1961). However, the concerns of self-accusation, perjury, or contempt are not sacrificed in the post-adjudication stage. Attention to fair play or to the prevention of inhumane treatment is likewise not lost in the effort to provide a sentencing judge with a full and complete pic-

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[9] See, for example, 13 V.S.A. § 11 or 18 U.S.C. § 3575 and 21 U.S.C. § 849.

ture of the convicted defendant. None of the aims articulated in *Murphy* would be effectuated by an extension of the privilege to the PSI interview. Moreover, there are other constitutional guarantees which amply safeguard the defendant's interests at sentencing.[10] In the absence of abuses or coercion, Fifth Amendment interests would not be served by the blanket exclusion of the defendant's statements in the PSI.[11]

The State recognizes that, despite the waiver of the privilege as it concerns the underlying conviction, the privilege continues to apply to answers which might incriminate a defendant in future criminal proceedings, *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1975), or which might expose a defendant to an enhanced penalty. *Estelle v. Smith*, 451 U.S. 454, 463 (1980). However, the privilege should be applied only when there is compulsion and incrimination. "The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply." *Ullmann v. U.S.*, 350 U.S. 422, 431 (1956), quoting from *Hale v. Henkel*, 201 U.S. 43, 67 (1906). This Court has long said that the privilege is not dependent on the type of the proceeding,

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[10] A defendant has a due process right to be sentenced on accurate information, *United States v. Tucker*, 404 U.S. 443 (1972); to have the sentence comport with Eighth Amendment standards, *Trop v. Dulles*, 356 U.S. 86, 101 (1958); to have a sentence proportionate to the crime for which defendant has been convicted, *Solem v. Helm*, 463 U.S. 277, 284 (1983); and to have an attorney present at sentencing, *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

[11] See, W. Schaefer, *The Suspect and Society*, at 61 (1967) (the privilege is described as "a doctrine in search of a reason"); Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cinn. L.R. 71 (1968); Dolinko, Is There a Rationale for the Privilege against Self-incrimination?, 33 UCLA 1063 (1986).

McCarthy v. Arndstein, 266 U.S. 34, 40 (1922), "but upon the nature of the statement or admission and the exposure it invites." *In re Gault*, 387 U.S. 1, 49 (1967).

In this case, the guilt phase of the prosecution had been completed upon the court's acceptance of defendant's pleas. The court ordered a PSI report at the change of plea hearing in anticipation of sentencing. There was no surprise resulting from the PSI interview, since defense counsel and the defendant were aware of this order. Defense counsel had had ample opportunity to meet with the defendant immediately after the change of plea hearing to discuss the implication of the PSI interview.[12] Under these circumstances, in light of the purposes of the privilege, the aims of sentencing, and the existence of future remedies, the defendant had no entitlement to the Fifth Amendment privilege.

B. *The PSI And The Individualized Sentence.*

The PSI interview of the defendant is designed to enable the court to fashion an individualized sentence by requiring the report to contain "any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior. . . ." V.R.Cr.P. 32(c)(2). (Pet.

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[12] The PSI report was ordered on 12/9/83. Sentencing was originally set for 1/11/84. The PSI is dated 1/18/84. The actual sentencing took place on 1/25/84. See original docket entries from district court and PSI report. (These items are not reprinted in the Joint Appendix.) 28 V.S.A. § 204(c) provides that, absent an extension from the court, the report must be prepared not more than three weeks from the date of order. No claim was ever made that there was inadequate time to meet with the defendant. A.B.A. standards place a duty on the defense attorney "to satisfy himself or herself that the defendant understands the nature of the presentence investigation process, and in particular the significance of statements made by the defendant to probation officer and related personnel." A.B.A. Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.3(f)(ii)(C) (vol. III 1980).

App. 16a-17a). The court relies upon a PSI and looks for the broadest information about a defendant's characteristics when it formulates an appropriate, individualized sentence.[13] *Wasman v. United States*, 468 U.S. at 563; *Williams v. New York*, 337 U.S. 241 (1949). In the federal PSI, the defendant's version of the offense is considered essential information.[14] Along with the federal system and standards proposed by national criminal justice institutions, Vermont advocates that a section in the report be based on a personal interview with the defendant.[15]

The function and purposes of the PSI cannot be completely effectuated without the defendant's explanation of the offense. Based on this and other material, the probation officer assesses the defendant's needs, and makes a recommendation for disposition. The PSI interview also provides an opportunity for the defendant to give his version of the offense and to offer mitigating circumstances. By advancing his view of the criminal episode, the report makes a significant contribution as a "personalized" document.

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[13] Indeed, considering how much more common it is that pleas are taken rather than trials held, the defendant's version in the PSI is oftentimes the only means by which the court can learn something about the defendant. *See*, Partridge, The Sentencing Options of Federal District Judges at 59 (Federal Judicial Center, June, 1985 rev.).

[14] United States Administrative Office of the U.S. Courts, *The Presentence Investigation Report*, Washington, D.C., U.S. Government Printing Office, 1984.

[15] *The Presentence Investigation Report*, see n.14, requires that the defendant be interviewed at least twice. Vermont recommends an initial interview and a follow-up interview, as necessary. Vermont Department of Corrections, *Procedures Manual*, The Presentence Investigation, Procedures. *See*, National Advisory Commission on Criminal Justice Standards and Goals. *Corrections*, § 5.14. *See*, by implication, A.B.A. Standards on Criminal Justice, Sentencing Alternatives and Procedures § 18-5.1, Commentary (vol. III 1980).

Additionally, if the defendant is ordered to serve a sentence, the interview and the PSI aid in classification and selection of programming. The PSI provides probation departments with a source of information for the development of supervision and implementation of the recommended case-plan, if the offender is placed on probation, and is of equal assistance to the paroling authority in its decision-making process. The report is also used by other treatment agencies and appellate courts in sentencing review.

If the state court's decision is allowed to stand, many problems for the criminal justice system can be anticipated. The PSI may follow the defendant from the sentencing courtroom to the probation officer, to the correctional facility, and to parole board hearings. With limitations on information in the PSI, judicial and correctional officers will be hampered in making sentences, assessments, case-plans and recommendations, which, in turn, will effect the release and reintegration of the defendant in society.

C. *Future Remedies.*

If incriminating material is revealed during the PSI interview, it is by no means certain that there will be a subsequent prosecution derived from these admissions.[16] If a charge does arise, at that time the accused could assert his Fifth Amendment privilege through a suppression or dismissal motion and put the burden on the government to show "that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy v. Waterfront Commission*, 378 U.S. at 79 n. 18 (1963). See *Kastigar v. United States*, 406 U.S. 441, 460 (1972). Knowledge that the privilege could be asserted subsequently encour-

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[16] The defendant has not been prosecuted for any other offenses described in the PSI.

ages the broadest possible array of information for judicial consideration at sentencing.[17]

This protection scheme has been cited with approval in an analogous context:

> [T]he purpose of the examination is not to bypass the adversary system and extract incriminating statements from the defendant to be used against him in a subsequent criminal proceeding. The clear purpose is to evaluate the prisoner so that he may be assigned to the appropriate institution at the appropriate custody level with a basic program plan for treatment that fits his rehabilitation and training needs. In this context, Taylor's right to be free from self-incrimination did not arise. Only if the state attempted to use the evaluation in a subsequent criminal proceding would Taylor's right to assert the Fifth Amendment be triggered. *See, Estelle v. Smith*, 451 U.S. at 462-65, 101 S.Ct. at 1872-74. At that time, Taylor would be entitled to have the evaluation suppressed if its content were offered against him and if Taylor had not otherwise waived the right.

Taylor v. Best, 746 F.2d 220, 224 (4th Cir. 1984). Where the privilege against self-incrimination may be successfully invoked in the future, there is no reason to block disclosure of reliable information helpful to the court in making an informed sentencing decision, once a judgment of guilty is entered.

IV. The Fifth Amendment Privilege Against Self-Incrimination Was Not Intended To Impede The Flow Of Information Used At Sentencing.

Consideration of the defendant's statements in the routine PSI by the sentencing judge does not automatically require the protections afforded by the Fifth Amendment

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[17] Of course, there must be a case-by-case review of any Fifth Amendment claim because incriminatory information may also be volunteered and not compelled. *Garrity v. New Jersey*, 385 U.S. 493, 499 (1967).

privilege. As stated in *Estelle*, 451 U.S. at 469 n. 13, "Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."

When the purpose for the interview and the gathering of information is non-accusatory, there is no violation of the privilege against self-incrimination. Even if the information from the defendant is private and personal in nature, the Fifth Amendment is not a bar to the acquisition of defendant's statements, because the statements are not sought for an incriminatory purpose. "[T]he Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which in the Court's view, did not involve compelled testimonial self-incrimination of some sort." *Fisher v. United States*, 425 U.S. 391, 399 (1975).

Courts have consistently looked to the reason underlying the collection of the defendant's statements to determine the application of the privilege. For example, in *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982), the court noted that:

> there is a substantial difference between a psychiatric examination of the defendant in a capital case which seeks to elicit evidence from the defendant relating to the critical aggravating factor of dangerousness, and a "routine" presentence interview, *see Estelle, supra*, 451 U.S. at 465, 101 S.Ct. at 1874, restricted to gathering information upon which the district court, in its discretion, may rely when imposing sentence.

692 F.2d at 576.

The *Bauman* court read *Estelle* narrowly and limited its holding to those cases involving the distinct circumstances of a bifurcated proceeding. The court reasoned that, since the government has no burden of proof at sentencing, the

PSI should not be circumscribed without constitutional justification.

Collection of evidence from an accused in a court-ordered psychiatric examination for competency, or in a routine PSI interview, for use at sentencing, should not be limited since the defendant ordinarily faces no threat of incrimination or compulsion. In *Estelle*, for example, it would have been entirely proper to order a psychiatric exam of a defendant if the exam were restricted to a routine competency determination. *Id.* at 465. *See, also, Hollis v. Smith*, 571 F.2d 685, 691 (2d Cir. 1978) (psychological questioning "did not involve compelled testimonial incrimination"); *State v. Mercier*, 128 N.H. 57, ——, 509 A.2d 1246, 1250 (1986) (the non-incriminating use of testimonial evidence derived from an exam removes case from the ambit of *Estelle's* prohibition); *Selby v. Shulsen*, 600 F.Supp. 432 (D. Utah 1984) (psychiatric testimony used at the penalty phase to establish defendant's mental condition did not violate privilege against self-incrimination); *Gibson v. State*, 110 Idaho 631, 639, 718 P.2d 283, 290 (1986) (no Fifth Amendment violation when the psychiatric testimony formed no part of the finding of aggravating circumstances.) "Compelled" psychological examinations which elicit incriminating statements do not violate Fifth Amendment principles, as long as the statements are not utilized to establish culpability or responsibility.

When the purpose for gathering the defendant's statements relates to the legitimate goals of sentencing, the consideration of these comments in the PSI is consistent with the Fifth Amendment. In *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1985), that court held that, since the accused's responses to questions posed in a pre-plea interview by a probation officer were used solely for the oral presentence report and not in the underlying prosecution, the privilege against incrimination was not infringed:

> After conviction, the danger of introducing responses to a probation officer's questions at the trial for the underlying offense is virtually nonexistent. The only use for such responses would be for revocation of parole or probation based on prior convictions or discovery of new or additional offenses not yet charged. The former use is not incriminatory under the Fifth Amendment; the latter use must be evaluated on a case by case basis to see if the question was likely to elicit an incriminatory response. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982).

752 F.2d at 1490.

In this case, the interview was part of the routine PSI process, as required by Rule 32 of the state and federal criminal rules, and, as a result, the inclusion of the defendant's statements was proper.

V. Miranda Warnings Are Not Required In The Non-Coercive Presentence Investigation Interview.

While the Vermont Supreme Court decision does not expressly mandate the *Miranda* warnings prior to a PSI interview, the import of this opinion is inescapable. The court held that the defendant's Fifth Amendment privilege had been violated. The court's erroneous recognition of the defendant's constitutional right to remain silent at the PSI interview creates the requirement of a warning and, in return, a waiver before the interview can take place. Constitutional rights must be knowingly, intelligently, and voluntarily waived. *Miranda v. Arizona*, 384 U.S. 436, 444 (1986). Under the Vermont Supreme Court's rationale in this case, the probation officer becomes a police officer responsible for explaining warnings and ascertaining waivers.

In *Miranda v. Arizona, supra*, the Court established procedural safeguards in order to prevent the subjugation of the individual to the will of his examiner in inherently coercive circumstances. Since the policy con-

cerns which produced those prophylaxes are not implicated by a post-adjudication interview by a probation officer for a PSI, there is no reason to administer the warnings.

The expansion of the *Miranda* decision to the post-adjudication defendant is wholly unwarranted. In *Minnesota v. Murphy*, 465 U.S. at 470, the Court observed that "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." The Court found that the probation interview was vastly different from an interview of a suspect by a police officer. Like the interview process in *Minnesota v. Murphy*, *supra*, a post-adjudication defendant knows he will be interviewed by a probation officer about his past and his view of the offense. The defendant expects and anticipates both the interview and questions from the probation officer. The interview is finite in scope. In the case at bar, the defendant was told he did not have to speak at the interview. J.A. 15. The appointment of counsel with whom respondent could have conferred suggests comparisons to the counselled taxpayer in *Garner v. United States*, 424 U.S. 648, 658 (1975), who was similarly not entitled to *Miranda* warnings in the absence of psychological pressures. The PSI interview presents none of the pressures sought to be minimized by the imposition of *Miranda* warnings.

Even if *Miranda* warnings were required at a pretrial competency examination, they are of no benefit once the defendant has pled and is being interviewed as a routine part of the sentencing process. At this non-accusatory stage, it is important that the defendant have the opportunity to convey information upon which the probation officer can form "an accurate appraisal of a defendant's social and criminal history and a recommendation for beneficial rehabilitative treatment which will best modify a defendant's behavior to conform to society's

requirements." *State v. Cawley*, 133 Ariz. 27, 28, 648 P.2d 142, 143 (1982). If, as a result of this process, damaging material is elicited and if it is used in a future prosecution, then the defendant has available a suppression or dismissal motion as a means of asserting his Fifth Amendment rights.

In *State v. Knapp*, 111 Wis.2d 380, 386, 330 N.W.2d 242, 245 (1983), that court noted the significant distinctions between a presentence investigation, the pre-trial competency examination, and the stationhouse interrogation:

> [P]re-sentence reports are designed to gather information concerning a defendant's personality, social circumstances and general pattern of behavior, so that the judge can make an informed sentencing decision. The interview does not involve the accusatorial atmosphere characterized by the stationhouse confrontation in *Miranda* or the psychiatric examination on "future dangerousness" at issue in *Estelle*. Therefore, the *Miranda* safeguards should not be required.

State v. Knapp, 111 Wis.2d at 386, 330 N.W.2d at 245.

Other courts have specifically recognized that application of *Miranda* warnings to the PSI interview is both without legal justification and likely to thwart the purpose of information gathering. ". . . *Miranda* has never been applied, to our knowledge, to routine pre-sentence interviews conducted for the benefit of a district judge in the exercise of his substantial discretion at sentencing. We see no reason to do so." *Baumann v. United States*, 692 F.2d at 576. The *Baumann* court stated that the safeguards cannot be divorced from the practical concerns and policy considerations which gave rise to the *Miranda* decision.

In the absence of the compelling pressures experienced by a suspect in a confrontation with a law enforcement officer, the warnings are not required even if the inter-

view is technically a custodial interrogation. "To require *Miranda* warnings before such routine pre-sentence interviews, therefore, would be to apply a principle 'broader than that required to implement the policy of Miranda itself.'" *Baumann v. United States*, 692 F.2d at 577, quoting from *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981). *See*, also, *State v. Heffran*, 129 Wis.2d 156, 166, 384 N.W.2d 351, 355 (1986); *Burch v. Indiana*, 450 N.E.2d 529, 530 (Ind. 1983); *Trimmer v. State*, 651 S.W.2d 904 (Tex. App. I Dist. 1983); *Booth v. Commonwealth*, 675 S.W.2d 856, 859 (Ky. 1984); *People v. Bachman*, 127 Ill. App. 3d 179, 185, 468 N.E. 2d 817, 822 (1984).

The report and the interview process are beneficial to the defendant because, as a consequence, a sentence will be tailored to fit the defendant's own special needs and circumstances. As the lower court recognized, see J.A. 19, "the pre-sentence interview is a stage that is designed to aid the defendant, rather than hurt him. The purpose of *Miranda* would not be served if we were to extend its application to the pre-sentence interview." *Commonwealth v. Burton*, 451 Pa. 12, ——, 301 A.2d 675, 677 (1973). Similarly, in *People v. Santana*, 184 Cal. Rptr. 733, 134 Cal. App.3d 773 (1982), the court observed that the purpose of the personal interview is

> to assist in developing mitigating factors as well as aggravating ones. A defendant cannot have it both ways. He knows or should know that information he gives the probation officer of a favorable nature will find its way into the report. He cannot expect that adverse information can be kept out by later claiming that he was not given an adequate warning of his constitutional rights.

People v. Santana, 184 Cal. Rptr. at 739-40, 134 Cal. App. 3d at 786.

In the instant case, the same positive factors attend the PSI interview. The defendant waived his right to

trial and his privilege against self-incrimination when the court accepted his pleas of nolo contendere to the three counts of simple assault. See V.R.Cr.P. 11(c)(4). He was already represented by a lawyer and had consulted with her. Both he and his attorney knew a PSI report had been ordered at the change of plea hearing. The interview with the probation officer and the scope of the inquiry came as no surprise.[18] Under these circumstances, *Miranda* warnings serve no useful purpose.[19]

The Court has recognized that *Miranda* warnings should not extend beyond "the context of the inherently coercive custodial interrogation for which it was designed." *Roberts v. United States*, 445 U.S. 552, 560 (1980). *Miranda* warnings were not designed by the Court with either psychiatric examinations, *see*, *Estelle v. Smith*, 451 U.S. at 475 (Rehnquist, J., concurring), or presentence investigation reports in mind. "Respondent was simply not in the inherently coercive situation considered in *Miranda*. He had already been indicted, and counsel had been appointed to represent him." *Id.* A formalistic recital of *Miranda* warnings should not be the required first step in a PSI interview.

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[18] The parameters of the report are clearly spelled out in Rule 32 of the state and federal criminal rules.

[19] The *Miranda* decision acknowledges that other formulations may be used in place of the litany of rights if the other procedures "are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467. Here, the probation officer told Cox he did not have to talk with her. J.A. 15. In effect, he was told he could be silent and bring the interview to an end.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of Vermont should be reversed.

Respectfully submitted,

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No. 86-1108

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT, PETITIONER

v.

RICK COX

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's Fifth Amendment privilege against compelled self-incrimination was violated when respondent participated in a presentence interview after the probation officer told him she would not return if he chose to postpone the interview until he had consulted an investigator from the public defender's office.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
I. Respondent's interview with the probation officer was not compelled	5
II. Respondent's statements to the probation officer were voluntary	10
III. The failure to remind respondent of his Fifth Amendment privilege creates no presumption that his admissions were compelled	13
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Barnes v. *United States*, 412 U.S. 837 (1973)	7
Battie v. *Estelle*, 655 F.2d 692 (5th Cir. 1981)	18
Baumann v. *United States*, 692 F.2d 565 (1982)	20
Beckwith v. *United States*, 425 U.S. 341 (1976)	6, 20
Booth v. *Commonwealth*, 675 S.W.2d 856 (Ky. 1984)	20
Brooks v. *Tennessee*, 406 U.S. 605 (1972)	10
Brown v. *Butler*, 811 F.2d 938 (5th Cir. 1987)	20
Brown v. *United States*, 356 U.S. 148 (1958)	7
Burch v. *State*, 450 N.E.2d 528 (Ind. 1983)	20
California v. *Beheler*, 463 U.S. 1121 (1983)	14-15
Cervantes v. *Walker*, 589 F.2d 424 (9th Cir. 1978)	15, 16, 17
Chaffin v. *Stynchcombe*, 412 U.S. 17 (1973)	8
Colorado v. *Connelly*, No. 85-660 (Dec. 10, 1986)	6

Cases—Continued: Page

Commonwealth v. *Burton*, 451 Pa. 12, 301 A.2d 675 (1973) 20
Estelle v. *Smith*, 451 U.S. 454 (1981) 6, 18, 20
Fitzpatrick v. *United States*, 178 U.S. 304 (1900) .. 7
Garner v. *United States*, 424 U.S. 648 (1976) 11, 12, 19
Jenkins v. *Anderson*, 447 U.S. 231 (1980) 8
Jones v. *Cardwell*, 686 F.2d 754 (9th Cir. 1982) 10
Mathis v. *United States*, 391 U.S. 1 (1968) 13, 17
McGautha v. *California*, 402 U.S. 183 (1971) 7, 8, 9
Michigan v. *Mosley*, 423 U.S. 96 (1975) 14
Michigan v. *Tucker*, 417 U.S. 433 (1974) 6
Minnesota v. *Murphy*, 465 U.S. 420 (1984) 6, 12, 13, 21
Miranda v. *Arizona*, 384 U.S. 436 (1966) 1-2, 13, 14, 15, 16
Oregon v. *Estad*, 470 U.S. 298 (1985) 14
Oregon v. *Mathiason*, 429 U.S. 492 (1977) 15
Palmigiano v. *Baxter*, 510 F.2d 534 (1st Cir. 1974), rev'd, 425 U.S. 308 (1976) 18
Roberts v. *United States*, 445 U.S. 552 (1980) 12, 13
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 7
Spencer v. *Texas*, 385 U.S. 554 (1967) 7
United States v. *Conley*, 779 F.2d 970 (4th Cir. 1985), cert. denied, No. 85-6467 (Oct. 6, 1986) .. 15, 16, 17
United States v. *Cooper*, 800 F.2d 412 (4th Cir. 1986) 16
United States v. *Dickson*, 712 F.2d 952 (5th Cir. 1983) 20
United States v. *Domenech*, 476 F.2d 1229 (2d Cir.), cert. denied, 414 U.S. 840 (1973) 6
United States v. *Havens*, 446 U.S. 620 (1980) 7
United States v. *Hayes*, 646 F. Supp. 146 (N.D. Ind. 1986) 16
United States v. *Johnson*, 488 F.2d 1206 (1st Cir. 1973) 6
United States v. *Mandujano*, 425 U.S. 564 (1976) .. 11, 12, 19
United States v. *Miller*, 771 F.2d 1219 (9th Cir. 1985) 6
United States v. *Monia*, 317 U.S. 424 (1943) 12

Cases—Continued: Page

United States v. *Paris*, 812 F.2d 471 (9th Cir. 1987) 6
United States v. *Pierce*, 561 F.2d 735 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978) 6
United States v. *Rodriguez*, 706 F.2d 31 (2d Cir. 1983) 6
United States v. *Scalf*, 725 F.2d 1272 (10th Cir. 1984) 16
United States v. *Sullivan*, 274 U.S. 259 (1927) 11
United States v. *Trejo-Zambrano*, 582 F.2d 460 (9th Cir.), cert. denied, 439 U.S. 1005 (1978) 6
United States v. *Washington*, 431 U.S. 181 (1977) 6
United States v. *Wiggins*, 509 F.2d 454 (D.C. Cir. 1975) 17
United States v. *Yurasovich*, 580 F.2d 1212 (3d Cir. 1978) 6
Williams v. *Florida*, 399 U.S. 78 (1970) 7

Constitution and rule:

U.S. Const. Amend. V (Self-Incrimination Clause) ..... *passim*
Fed. R. Crim. P. 32(c) 1

Miscellaneous:

U.S. Sentencing Comm'n, *Sentencing Guidelines & Policy Statements for the Federal Courts* (Apr. 13, 1987) 19

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1108

STATE OF VERMONT, PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The procedures for conducting presentence interviews involved in this case closely parallel the procedures used in the federal courts. See Fed. R. Crim. P. 32(c). Accordingly, the Court's decision in this case may affect the practice of federal probation officers in conducting presentence interviews with convicted defendants. In addition, the federal government has a significant interest in the interpretation of the Fifth Amendment privilege against compulsory self-incrimination and the scope of *Miranda* v.

Arizona, 384 U.S. 436 (1966), issues that are presented by the facts of this case.

STATEMENT

Respondent, who was originally charged with kidnapping, entered nolo contendere pleas to three counts of simple assault in the District Court of Vermont. Following respondent's entry of his plea, the district court ordered the probation officer to prepare a presentence report. To help her prepare the report, the probation officer scheduled an interview with respondent at the correctional institution where he was incarcerated (Pet. App. 2a). At the subsequent sentencing hearing, respondent's counsel described what happened when the probation officer arrived for the interview (Pet. App. 4a; J.A. 15):

> [W]hen the Probation Officer came to interview our client we in fact arranged for our investigator to go down and talk with him to prepare him for what would be coming forward, and he indicated to the Probation Officer that he really didn't want to talk to her until [the investigator on the case] was there. * * * And she indicated to him that that was fine but she wouldn't come back again. And made him feel as though he would have no opportunity to consult with us before talking with her.

Respondent then agreed to be interviewed. In the course of the interview, respondent discussed with the probation officer his drug-related activities (Pet. App. 6a-7a). The presentence report contained references to respondent's admissions about his prior involvement with drugs (J.A. 20-21, 22, 23).

At the sentencing hearing, respondent's counsel objected to the court's consideration of the presentence report. Counsel relied primarily upon a state court decision holding that a sentencing court may not rely on "mere assertions of criminal activity." In addition, counsel argued that some of respondent's admissions to the probation officer should not be considered by the court because if respondent had had an opportunity to speak with a representative of the public defender's office prior to the interview, he would have been advised not to make some of the admissions he made (J.A. 15). Counsel further asserted that "it must be Constitutionally necessary for the probation officer who is preparing a [presentence report] to * * * tell a defendant his rights he is waiving and what trouble he might get himself into by being fully open and not remaining silent" (J.A. 17).

The district court rejected counsel's arguments and accepted the presentence report with some redactions (J.A. 17-20). After giving respondent an opportunity to make a statement, which respondent refused (J.A. 21), the court imposed consecutive terms of 6 to 12 months' imprisonment on each of the three counts.

On appeal to the Vermont Supreme Court, respondent argued that the sentencing court erred by relying on information in the presentence report that was obtained in violation of respondent's privilege against compulsory self-incrimination and his right to counsel (Pet. App. 2a). The Vermont Supreme Court vacated the sentence on the basis of respondent's claim under the Fifth Amendment; the court therefore did not address his other claims (*ibid.*). The court first found that respondent's request to

consult with the investigator was equivalent to a request to consult with counsel (Pet. App. 5a).[1] It then rejected the State's argument that the Fifth Amendment privilege is inapplicable to presentence investigations (Pet. App. 4a) and its argument that respondent's decision to proceed with the interview constituted a waiver of the privilege (Pet. App. 4a-7a). The court noted that respondent "was presented with two choices: (1) to await the investigator and forfeit the interview, or (2) to proceed with the interview without additional advice" (Pet. App. 6a). As a result, the court concluded, the condition under which respondent continued with the presentence interview was coercive, which rendered respondent's statements involuntary, in violation of his Fifth Amendment rights (*ibid.*). Although the court referred in passing to the fact that respondent was incarcerated at the time of the interview, it did not consider whether *Miranda* warnings were necessary. As a remedy for the Fifth Amendment violation, the court vacated respondent's sentence and remanded for the preparation of a new presentence report and resentencing by a judge unfamiliar with the original report (Pet. App. 7a).

SUMMARY OF ARGUMENT

The Vermont Supreme Court was incorrect in holding that respondent's statements were obtained in violation of his Fifth Amendment privilege against compulsory self-incrimination. First, the choice presented to respondent—to participate in a presentence interview at the appointed time without the advice of his counsel's representative, or to forfeit the inter-

[1] The State does not challenge this determination, nor do we.

view completely—does not amount to compulsion within the meaning of the Fifth Amendment. Second, even if respondent is viewed as having been compelled to proceed with the interview, he voluntarily chose to provide information without asserting his Fifth Amendment privilege. The general rule is that the Fifth Amendment privilege is not self-executing; even a witness who is compelled to testify must assert the privilege or lose the benefit of it. If he chooses to make disclosures instead of claiming the privilege, the government has not compelled him to incriminate himself. Finally, although the situation presented by custodial interrogation has been held to be an exception to the general rule that one must assert the Fifth Amendment privilege in order to benefit from its protections, the extraordinary safeguard of requiring specific warnings and a voluntary waiver of Fifth Amendment rights as a prerequisite to custodial interrogation was not a basis for the state court's decision, nor is it applicable to the circumstances of this case. Respondent's disclosures to the probation officer therefore did not constitute a form of compelled self-incrimination in violation of respondent's Fifth Amendment privilege.

ARGUMENT

I. RESPONDENT'S INTERVIEW WITH THE PROBATION OFFICER WAS NOT COMPELLED

When the investigator from the public defender's office did not arrive for respondent's presentence interview on time, respondent was faced with the choice of speaking to the probation officer at the designated time or forgoing the interview. That choice did not constitute a form of coercion sufficient to render respondent's statements involuntary in viola-

tion of his Fifth Amendment privilege (Pet. App. 6a).[2]

What the Fifth Amendment privilege proscribes is not the necessity to make difficult choices, but "genuine compulsion of testimony." *United States* v. *Washington*, 431 U.S. 181, 187 (1977) (quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974)). That compulsion exists only in situations in which official actions "overbear [defendant's] will to resist and bring about confessions not freely self-determined" (*Beckwith* v. *United States*, 425 U.S. 341, 348 (1976)). Cf. *Colorado* v. *Connelly*, No. 85-660 (Dec. 10, 1986), slip op. 9 ("coercive police activity

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[2] We do not dispute that respondent enjoyed the protection of the Fifth Amendment privilege, despite the fact that he had been convicted on his plea of nolo contendere. As this Court noted in *Estelle* v. *Smith*, 451 U.S. 454, 462-463 (1981), the availability of the Fifth Amendment privilege turns on the nature of the statement and the exposure it invites, not on the type of proceeding in which the privilege is asserted. See *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). A convicted but unsentenced defendant may often retain Fifth Amendment rights, even with regard to the subject matter of his conviction, for two reasons. First, any admissions he makes may subject him to enhanced punishment. See *United States* v. *Paris*, 812 F.2d 471, 475 (9th Cir. 1987); *United States* v. *Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985); *United States* v. *Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.), cert. denied, 439 U.S. 1005 (1978); *United States* v. *Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973); *United States* v. *Domenech*, 476 F.2d 1229, 1231 (2d Cir.), cert. denied, 414 U.S. 840 (1973). Second, he may be exposed to the hazards of self-incrimination with respect to possible prosecution for other crimes, either in that jurisdiction or others. See *United States* v. *Rodriguez*, 706 F.2d 31, 36-37 (2d Cir. 1983); *United States* v. *Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978); *United States* v. *Pierce*, 561 F.2d 735, 738-739 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978).

is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223-227 (1973) (concept of voluntariness requires consideration of totality of circumstances to determine whether defendant's "will has been overborne and his capacity for self-determination critically impaired"). The choice that the probation officer gave to respondent was not even remotely coercive under that standard.

This Court has repeatedly held that the Fifth Amendment privilege does not protect an individual from being faced with hard choices as to whether to exercise the privilege. The Court summarized a number of those choices in *McGautha* v. *California*, 402 U.S. 183 (1971). Thus, a criminal defendant must decide whether to testify in his own defense, knowing that if he does, he will then be subject to cross-examination, and that he may be impeached by proof of prior convictions or the like. *Id.* at 215; see, *e.g.*, *Brown* v. *United States*, 356 U.S. 148 (1958); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900); *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967); *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980). A defendant whose motion for judgment of acquittal is denied at the close of the government's case must decide whether to put on a defense, knowing that if he does, he runs the risk of bolstering the government's case enough to support a guilty verdict. *McGautha* v. *California*, 402 U.S. at 215. And a defendant must choose between remaining silent and subjecting himself to cross-examination by testifying in order to present an affirmative defense. *Id.* at 216; *Williams* v. *Florida*, 399 U.S. 78, 84 (1970); *Barnes* v. *United States*, 412 U.S. 837, 846-847

(1973). Even though each of these choices is difficult, the Court has held that the government does not violate the Fifth Amendment by requiring the defendant to make them.[3]

The Court's decision in *McGautha* is especially pertinent to this case. In *McGautha*, the Court rejected the defendant's claim that the state's single-verdict procedure, where guilt and punishment are both determined by a jury at a single trial, unlawfully compelled the defendant to become a witness against himself on the issue of guilt because of the risk that he might be sentenced to death without having addressed the sentencing body. The Court concluded that this was simply one more of the hard choices routinely faced by criminal defendants (42 U.S. at 213):

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *McMann* v. *Richardson*, 397 U.S. [759,] 769 [(1970)]. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The

[3] See also *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). The Court there held that a state could constitutionally impeach a testifying defendant with his silence at the time of his arrest. The Court noted (*id.* at 236) that "[i]t can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." The Court pointed out, however, that the Constitution "does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'" (*ibid.*, quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973)).

> threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Based on this analysis, the Court in *McGautha* rejected "the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself" (402 U.S. at 216). The fact that a defendant's sentence, rather than his guilt, was at issue did not "call for a difference in constitutional result" (402 U.S. at 216-217). Accordingly, the Court concluded that the policies of the privilege against compulsory self-incrimination are not offended when a defendant in a capital case "yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt" (402 U.S. at 217).

If, as the Court concluded in *McGautha*, the policies of the Fifth Amendment privilege are not offended when the defendant "yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt" (402 U.S. at 217), it follows a fortiori that the Fifth Amendment is not violated when a defendant in a non-capital case yields to the far less compelling pressure of participating in the presentence interview lest he lose his opportunity to tell his side of the story to the probation officer. This is particularly true in light of the fact that even if respondent had chosen not to participate in the interview, he would still have been able to "speak to [his] sentencer" (*McGautha*, 402 U.S. at 216) by exercising his right of allocution. Thus, the only pressure that the probation officer's choice exerted on respondent stemmed from respondent's perception that by failing to participate in the interview, he might reduce his prospects that the probation offi-

cer would write a favorable sentencing report.[4] That is not enough to render respondent's interview with the probation officer the product of compulsion.[5]

II. RESPONDENT'S STATEMENTS TO THE PROBATION OFFICER WERE VOLUNTARY

Even if this Court concludes, contrary to our submission, that the presentence interview was compelled, respondent's statements were nonetheless vol-

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[4] Because the probation officer's refusal to reschedule the presentence interview did not prevent respondent from addressing the sentencing court, this case is not analogous to *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), in which the Court struck down a state statute that required that the defendant testify immediately after the close of the state's case, or not at all. In *Brooks*, the consequence of the defendant's refusal to testify at the outset of the defense case was that the defendant lost all opportunity to testify at trial. In this case, by contrast, respondent lost only the opportunity to influence the probation officer's report.

Although there is no claim in this case that the presentence interview was improperly scheduled, the Vermont Supreme Court apparently assumed that respondent had the right to demand additional time for legal consultation (Pet. App. 5a-6a). If, under state law, respondent had a right to such a "continuance," so that the probation officer erred in refusing to postpone the interview, respondent might have a right—conferred, if at all, only by state law—to be reinterviewed if he had declined to be interviewed and been incorrectly deprived of his right to a subsequent interview by the probation officer's error. His decision to proceed with the scheduled interview, however, rendered consideration of that question unnecessary.

[5] This case is a far cry from *Jones* v. *Cardwell*, 686 F.2d 754 (9th Cir. 1982), on which the state court relied. In that case, the defendant was told that he had no choice but to answer the probation officer's questions during the presentence interview; in this case, by contrast, respondent was offered the choice—albeit not on the terms he preferred—and he decided to exercise his option to participate in the interview.

untary and therefore were not obtained in violation of respondent's privilege against compulsory self-incrimination. When the probation officer presented respondent with the choice of participating in the scheduled interview or forgoing the opportunity of being interviewed, respondent decided to be interviewed, and he answered all the questions put to him without objection. Accordingly, his responses to the probation officer's questions—even if incriminating—were not involuntary.

The Vermont Supreme Court ignored the important distinction between compulsion to participate in the interview and the voluntary decision to make incriminating statements without asserting the privilege. It is quite clear from this Court's cases that the mere obligation to appear and answer questions does not make otherwise voluntary statements compelled ones within the meaning of the Fifth Amendment. The Fifth Amendment privilege does not confer on a witness an absolute right to refuse to respond to a grand jury summons or a subpoena to testify at trial.[6] But a witness in either proceeding has not been compelled to answer within the meaning of the Fifth Amendment unless he is required to answer specific incriminating questions despite a valid claim of the privilege. *United States* v. *Mandujano*, 425 U.S. 564, 572-575 (1976) (plurality opinion). Similarly, a taxpayer is certainly compelled to file a tax return, but that requirement does not mean that he is compelled to engage in a self-incriminatory act in the course of completing the return. *Garner* v. *United States*, 424 U.S. 648, 650-656 (1976); *United States* v. *Sullivan*, 274 U.S. 259 (1927). And a pro-

[6] In contrast, respondent was offered the option of not participating in the presentence interview.

bationer who is required to report to his probation officer and answer questions truthfully is not thereby compelled to incriminate himself. *Minnesota* v. *Murphy*, 465 U.S. 420, 427 (1984). The question is what happens when the witness under compulsion to testify is asked incriminating questions.

At that point, the general rule is that such a witness, once asked incriminating questions, must claim the protection of the privilege or he will not be considered to have been compelled. "[I]f a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner* v. *United States*, 424 U.S. 648, 654 (1976) (footnote omitted). As the Court has explained, "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." *Roberts* v. *United States*, 445 U.S. 552, 559 (1980); *Minnesota* v. *Murphy*, 465 U.S. at 427, 429 (the same rule applies to a witness who is confronted with questions that the government should reasonably expect will elicit incriminating evidence); *United States* v. *Mandujano*, 425 U.S. at 574-575 (quoting *United States* v. *Monia*, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting)).

Respondent's decision to participate in the interview and to answer all the probation officer's questions, without claiming his privilege when the probation officer inquired about his drug-related activities, precludes his belated assertion that the disclosures he made in response to those inquiries were compelled. The district court thus could properly rely upon those

disclosures in determining the appropriate sentence to impose on respondent.

III. THE FAILURE TO REMIND RESPONDENT OF HIS FIFTH AMENDMENT PRIVILEGE CREATES NO PRESUMPTION THAT HIS ADMISSIONS WERE COMPELLED

An exception to the general rule that the Fifth Amendment privilege must be claimed is the requirement of *Miranda* v. *Arizona*, *supra*, that incriminating statements obtained during custodial interrogation must be excluded unless the suspect failed to claim the Fifth Amendment privilege after being specifically advised of his right to remain silent and of the consequences of his failure to assert it. The Court has made it clear, however, that this exception "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts* v. *United States*, 445 U.S. at 560; see also *Minnesota* v. *Murphy*, 465 U.S. at 429-430. This case does not involve such a context.

Although the Vermont Supreme Court did not rely on *Miranda* v. *Arizona*, *supra*, its decision might be explained under this Court's cases interpreting the *Miranda* doctrine (see, *e.g.*, *Mathis* v. *United States*, 391 U.S. 1 (1968); *Minnesota* v. *Murphy*, 465 U.S. at 429-430) on the theory that, because respondent's statements were taken while he was in custody and because the probation officer failed to advise him of his *Miranda* rights, those statements were inadmissible in any judicial proceeding.[7] "Failure to admin-

[7] It is quite clear that this is not the basis on which the court in fact decided the case. Not only did the court fail to mention *Miranda* or its progeny, but it also mentioned only in passing that defendant was incarcerated, and it said

ister *Miranda* warnings [when they are required] creates a presumption of compulsion." *Oregon* v. *Elstad*, 470 U.S. 298, 307 (1985). This rationale assumes that *Miranda* applies in this situation, when in fact it does not.[8]

This Court's decision in *Miranda* was premised on the assumption that custodial police interrogation presents a special risk of pressures that may violate the prohibition against compelled self-incrimination. The Court emphasized that the purpose of the warnings prescribed in *Miranda* is to protect against these pressures, and that warnings therefore are not required in every case of official questioning (384 U.S. at 477, 478). The warnings must be administered only when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (*id.* at 444 (footnote omitted)). The Court subsequently has made clear that the proper inquiry for determining when a suspect is in police custody is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v.

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nothing about whether *Miranda* warnings—or any other warnings—were given. The record does not reveal that any such warnings were given.

[8] The anomaly of applying the *Miranda* rationale to this case is demonstrated by the fact that the state court faulted the probation officer for offering to do precisely what *Miranda* requires—to terminate the interview when the defendant states that he wishes the advice of counsel before proceeding. Nothing in *Miranda* suggests any further obligation to resume the questioning later. See *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

Beheler, 463 U.S. 1121, 1125 (1983) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977)).

Miranda involved police questioning of individuals suspected of criminal activity who were not otherwise subject to confinement. Respondent, however, was incarcerated because he had already been convicted; he was not in any special custodial status for the purpose of or in connection with investigative questioning, the setting for which *Miranda* was intended.

An inmate who is questioned for some purpose without the imposition of any additional restraints on his liberty is not in the same position for purposes of *Miranda* as a suspect who was previously at liberty and is taken into custody for the purpose of questioning. The courts of appeals have recognized that "[a] rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials" (*United States* v. *Conley*, 779 F.2d 970, 973 (4th Cir. 1985), cert. denied, No. 85-6467 (Oct. 6, 1986)). Thus, application of the traditional standard for determining whether an interviewee is in custody for purposes of *Miranda* "would be tantamount to a *per se* finding of 'custody'" for prison inmates. *Ibid.*; see also *Cervantes* v. *Walker*, 589 F.2d 424, 427-428 (9th Cir. 1978) (application of the traditional "'free to leave'" standard would "lead to the conclusion that all prison questioning is custodial because a reasonable prisoner would always believe he could not leave the prison freely," thus leading to "the illogical position of providing greater protection to a prisoner than to his nonimprisoned

counterpart"). This result would be wholly inappropriate.[9]

A prison inmate, of course, enjoys no freedom of movement. The restraints upon a prisoner's liberty that are a constant of everyday prison life become familiar to the inmate and are therefore unlikely to have the coercive effect that the *Miranda* warnings are designed to dispel. Such a coercive effect will arise in the prison context only when an inmate's liberty has been restricted in some manner that is different from the restraints that are a consistent feature of prison life. As the Ninth Circuit has observed, "[i]n the prison situation, [the concept of restriction of the suspect's freedom] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. * * * [W]e look to some act which places further limitations on the prisoner." *Cervantes* v. *Walker*, 589 F.2d at 428; accord *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); *United States* v. *Conley*, 779 F.2d at 972-974; *United States* v. *Scalf*, 725 F.2d 1272, 1275-1276 (10th Cir. 1984); *United States* v. *Hayes*, 646 F. Supp. 146, 149-151 (N.D. Ind. 1986). For these reasons, a prison inmate should be deemed to be in custody for purposes of *Miranda* only if he is subjected to more

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[9] *Miranda* itself states that it was "not intended to hamper the traditional function of police officers in investigating crime" and that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the] holding" (384 U.S. at 477). Failure to modify the definition of "custody" to take account of the special circumstances of the prison setting would deprive prison administrators of this leeway accorded by *Miranda* itself.

than the usual restraint on his liberty to depart (*Cervantes* v. *Walker*, 589 F.2d at 428).

We do not believe that a contrary result is required by this Court's decision in *Mathis* v. *United States*, 391 U.S. 1 (1968). In *Mathis*, an inmate incarcerated in a state prison was interviewed by an agent of the Internal Revenue Service about possible federal income tax violations. The agent did not administer *Miranda* warnings before initiating the questioning. This Court reversed the inmate's subsequent conviction for filing false tax returns on the ground that incriminating statements made in the course of the interview should not have been admitted at trial. The Court rejected the government's argument that *Miranda* is applicable "only to questioning [of] one who is 'in custody' in connection with the very case under investigation" (391 U.S. at 4-5).

To be sure, the Court's brief opinion in *Mathis* can be read as establishing a per se rule that an inmate who is subject to questioning is automatically 'in custody' and is therefore entitled to *Miranda* warnings merely by virtue of his status as a prisoner. We believe, however, that *Mathis* is better understood as simply rejecting the government's competing per se rule that *Miranda* should not be applicable to an inmate who is in custody in connection with a case other than the one under investigation. Several courts of appeals have interpreted *Mathis* in that fashion. See *United States* v. *Conley*, 779 F.2d at 972; *Cervantes* v. *Walker*, 589 F.2d at 427; see also *United States* v. *Wiggins*, 509 F.2d 454, 459-460 (D.C. Cir. 1975). Under that interpretation, a prisoner is not put in a better position than an ordinary citizen by being entitled to *Miranda* warnings prior to questioning of any sort, regardless of the setting.

On the other hand, the prisoner is not put in a worse position than unincarcerated persons, since he is entitled to *Miranda* warnings if the normal circumstances of his confinement are changed for purposes of the interview in question.[10]

There was no such additional restraint here. Indeed, both the probation officer and respondent acted on the understanding that the presentence interview was an *opportunity* offered to respondent, not an incident of incarceration to which he was required to submit. That understanding of the situation also underlies the Vermont Supreme Court's analysis—the "coercive" threat, in its view, was the threat that respondent would "forfeit" the opportunity to have the interview at a later date (Pet. App. 6a). The interview was thus viewed as a chance for respondent to benefit himself, not as an obligation or an imposition on him.[11]

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[10] Formal investigative questioning of an inmate typically results in a change in the normal circumstances of the inmate's confinement that may justify a finding that the inmate was in custody for *Miranda* purposes. That was the case in *Mathis*, and it was also the case in several of the court of appeals cases that have held *Miranda* applicable to interrogation of a prison inmate. See *Battie* v. *Estelle*, 655 F.2d 692, 699 (5th Cir. 1981) (defendant awaiting trial in county jail was entitled to *Miranda* warnings when he was examined by a court-appointed psychologist); *Palmigiano* v. *Baxter*, 510 F.2d 534, 536-537 (1st Cir. 1974), rev'd on other grounds, 425 U.S. 308 (1976) (*Miranda* warnings required when incarcerated suspect was interviewed in connection with prison disciplinary proceeding); see also *Estelle* v. *Smith*, 451 U.S. 454, 466-469 (1981) (warnings must precede court-ordered psychiatric examination of prisoner).

[11] In the federal system, the offender's cooperation with the probation office may often be a critical factor for the sentencing court when there is a question whether to place an offender

Moreover, the presentence interview does not involve the sort of risk of intimidation or trickery presented by police interrogation upon which *Miranda* was based. See, *e.g.*, *United States* v. *Mandujano*, 425 U.S. at 579-580. The presumption "that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent" (*Garner* v. *United States*, 424 U.S. at 657), is simply inapplicable here, where the probation officer was faulted precisely for offering respondent the option of remaining silent.

There is no suggestion that the course or contents of the interview itself were in any way affected by the fact that petitioner attended the interview while he was incarcerated, rather than released pending sentencing. In the absence of any such suggestion, the fact that defendant is incarcerated rather than released pending sentencing should not make the interview itself custodial interrogation. The Ninth Circuit has recognized this, holding that "[n]othing in the record suggests that * * * presentence interviews

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on probation or impose a term of imprisonment. In the *Sentencing Guidelines & Policy Statements for the Federal Courts* submitted to Congress and the President on April 13, 1987, the United States Sentencing Commission has formalized consideration of this factor. The guidelines provide that the court may reduce the offense level by two levels, depending upon the nature of the case and manner and extent to which the defendant acknowledged responsibility. In making this determination, one factor the guidelines suggest that the court look to is whether the defendant made "voluntary and truthful admission to authorities of involvement in the offense and related conduct." See Section 3E1.1 and commentary to that section. It is thus apparent why an offender is likely to regard a presentence interview as an opportunity to have a favorable influence on the disposition of his case.

in general[] entail pressures at all similar to those 'which the *Miranda* court found so inherently coercive as to require its holding.'" *Baumann* v. *United States*, 692 F.2d 565, 577 (1982) (quoting *Beckwith* v. *United States*, 425 U.S. 341, 341, 347 (1976)). The Fifth Circuit agrees (*Brown* v. *Butler*, 811 F.2d 938, 941 (1987)). Cf. *United States* v. *Dickson*, 712 F.2d 952, 955 (5th Cir. 1983) (no violation of Fifth Amendment privilege when presentence report comments unfavorably on defendant's refusal to cooperate with federal agents). Several state cases have reached the same result.[12]

As *Baumann* and *Brown* recognize, *Estelle* v. *Smith*, 451 U.S. 454 (1981), is not inconsistent with this analysis. There, this Court concluded that statements an incarcerated defendant made to a psychiatrist in the course of a court-ordered pretrial competency examination could not be used to support imposition of the death penalty because the defendant was not informed of his right to remain silent. The error in *Estelle* was that statements made in the course of a routine competency examination were later used to persuade the jury to impose the death penalty. The Fifth Amendment privilege was implicated only because the State "used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty." 451 U.S. at 466. There was no such trickery involved here. Respondent chose to discuss his prior offenses with the probation officer conduct-

[12] *Burch* v. *State*, 450 N.E.2d 528 (Ind. 1983) (Miranda warnings not required at presentence interview; does not disclose whether defendant was incarcerated); *Commonwealth* v. *Burton*, 451 Pa. 12, 14, 301 A.2d 675, 677 (1973) (same); *Booth* v. *Commonwealth*, 675 S.W.2d 856 (Ky. 1984) (same).

ing the presentence interview. Unlike the respondent in *Estelle*, he could scarcely have been under any misapprehension as to the use that might be made of his statements. Cf. *Minnesota* v. *Murphy*, 465 U.S. at 432-433 (probationer has no reasonable expectation that statements to probation officer will remain confidential). *Estelle* indicates that the routine use of statements made in a competency hearing for the purpose for which they are intended is constitutionally unobjectionable. 451 U.S. at 465. The routine use of presentence interview statements for the purpose for which they are intended is similarly constitutionally acceptable.

CONCLUSION

The judgment of the Vermont Supreme Court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT

I. Respondent's Sixth Amendment Right To Assistance Of Counsel Was Not Violated During The PSI Interview; Prior Notice Of The PSI Interview And Its Purpose Sufficiently Protected Respondent's Rights In The Non-Adversarial Interview 1

A. This court should decline consideration of this claim 1

B. Prior notice gave respondent the opportunity to consult with counsel before the PSI interview 2

C. The nature of the PSI interview does not justify the extension of right to counsel beyond prior notice and an opportunity to consult with counsel 4

D. Under the Ash test, respondent's rights were not violated 5

1. Respondent did not need help coping with the legal system at the time of interview 5

2. Respondent was not confronted by an expert adversary 6

3. Even if the PSI interview was deemed a "critical stage," there is no *per se* Sixth Amendment violation 7

E. There is no right to actual presence of counsel at the interview 8

F. Even if the respondent's right to counsel was violated, such error is harmless 9

II. This Cause Is Not Moot 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — Page

Baumann v. United States, 692 F.2d 565 (9th Cir. 1982) 6
Brown v. Butler, 811 F.2d 938 (5th Cir. 1987) 6
Connecticut v. Barrett, —— U.S. ——, 107 S.Ct. 828 (1987) 2
Estelle v. Smith, 451 U.S. 454 (1980) 5, 6, 7, 8
Gagnon v. Scarpelli, 411 U.S. 778 (1972) 9
Gerstein v. Pugh, 420 U.S. 103 (1975) 4
Griffin v. Wisconsin, —— U.S. ——, 107 S.Ct. 3164 (1987) 7
Maine v. Moulton, —— U.S. ——, 106 S.Ct. 477 (1985) 8
Mempa v. Rhay, 389 U.S. 128 (1967) 4
Michigan v. Jackson, —— U.S. ——, 106 S.Ct. 1404 (1986) 2
Powell v. Alabama, 287 U.S. 45 (1932) 6-7
State v. Chambers, 144 Vt. 377, 477 A.2d 974 (1984) 6
State v. Ramsay, 146 Vt. 70, 99 A.2d 15 (1985) 8
State v. Rathburn, 140 Vt. 382, 442 A.2d 452 (1981) 6
Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969) 8
Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) 8
United States v. Ash, 413 U.S. 300 (1972) 5, 6, 7, 8
United States ex rel. Bachman v. Hardy, 637 F. Supp. 1273 (N.D. Ill. 1986) 5
United States v. Baird, 414 F.2d 700 (2nd Cir. 1969) 7
United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) 8
United States v. DiFrancesco, 449 U.S. 134 (1980) 5
United States v. Morrison, 449 U.S. 361 (1980) 9
United States v. Sharpe, 470 U.S. 675 (1985) 10
United States v. Wade, 388 U.S. 218 (1967) 8

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS — Page

U.S. Constitution, Amendment V ---- 2, 5, 9
U.S. Constitution, Amendment VI ---- *passim*

STATUTES

13 V.S.A. § 7041 ---- 10
13 V.S.A. § 7041(b) ---- 10
28 V.S.A. § 204 ---- 3

RULES

V.R.Cr.P. 32 ---- 3
V.R.Cr.P. 32(c)(4) ---- 8

MISCELLANEOUS

A.B.A. Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.3(f)(ii)(C) (Vol. III 1980) ---- 4

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. RESPONDENT'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL WAS NOT VIOLATED DURING THE PSI INTERVIEW; PRIOR NOTICE OF THE PSI INTERVIEW AND ITS PURPOSE SUFFICIENTLY PROTECTED RESPONDENT'S RIGHTS IN THE NON-ADVERSARIAL INTERVIEW.

A. The Court should decline consideration of this claim.

Petitioner first asserts that, in an exercise of its discretion, the Court should decline consideration of a claim which was not addressed by the state supreme court. The Vermont Supreme Court based its decision solely on

the Fifth Amendment.[1] This Court should not decide a claim not fully examined by the court below nor contained within the question accepted for review.

B. Prior notice gave respondent the opportunity to consult with counsel before the PSI interview.

Should the Court examine this issue, the Sixth Amendment claim is without merit since the respondent had received prior notice of the presentence investigation (PSI) interview and had had an opportunity to consult with counsel about the interview process and the use of his statements at the sentencing hearing. Respondent argues that, by calling for an investigator, he invoked his Sixth Amendment right to counsel at the interview.[2] By asserting the existence of the right and arguing the absence of a waiver on the record,[3] the respondent ignores the facts and the law which are relevant to a determination of the extent of his rights. Since the respondent had had a prior opportunity to receive assistance of counsel,

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[1] Pet. App. 1a-7a. While respondent's brief filed at the state supreme court argued that the information in the PSI report was obtained in violation of both his privilege against self-incrimination and right to counsel, the Vermont Supreme Court did not reach the latter claim. Pet. App. 2a.

[2] The petitioner does not concede that a request to speak with a defense *investigator* amounts to a request for assistance of counsel. Just as in *Connecticut v. Barrett*, —— U.S. ——, 107 S.Ct. 828, 832 (1987), interpretation of this remark is clear. Respondent had been through the criminal justice system; he knew the difference between an investigator and his attorney. "To conclude that respondent invoked his right to counsel . . . requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement." *Id.*

[3] Respondent's reliance on the waiver argument, discussed in *Michigan v. Jackson*, —— U.S. ——, 106 S.Ct. 1404 (1986), is misplaced. Respondent had already received the full extent of his right to counsel prior to the interview; at that point he had been afforded an opportunity to consult with counsel. He had no reason to waive that which he had already received.

his decision to go ahead without additional advice was a matter of choice and not a constitutional violation.

On December 9, 1983, at the change of plea hearing, the trial judge ordered the PSI report to assist the court at the upcoming sentencing hearing. J.A. 1.[4] Respondent and his counsel learned that, pursuant to 28 V.S.A. § 204 and V.R.Cr.P. 32,[5] a probation officer would interview Cox in preparation for the presentence report.

Defense counsel asserted at the sentencing hearing that her office

> in fact arranged for our investigator to go down and talk with him to *prepare* him for what would be coming forward . . . . [The probation officer] made him feel as though he would have no opportunity to consult with us *before* talking with her. So that much of the material which has been included . . . are things that our client would have been advised about had he had an opportunity to speak with us first. J.A. 15. (Emphasis added)

Defense counsel had exactly such an opportunity to prepare respondent for the meeting well before the actual interview, since prior notice of the PSI interview is uncontroverted.[6]

It is entirely appropriate that defense counsel bear the burden of explaining "the nature of the presentence

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[4] Consistent with Vermont practice, the PSI report was ordered in open court in the presence of the parties.

[5] *See* Pet. App. 10a, 16a-17a.

[6] The date of the PSI interview is not clear from the record. Following customary practice in Vermont, in the case of an incarcerated defendant, the probation department is notified by the court clerk that the judge has ordered a PSI. Following notification the report is assigned to a probation officer. The interview takes place at some later date. For additional discussion of the sequence of events surrounding the PSI interview, *see* Petitioner's Brief at 14 n. 12.

investigation process, and in particular the significance of statements made by the defendant to probation officer and related personnel." ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.3(f)(ii)(C) (Vol. III 1980). Only a defense counsel can properly help a respondent shape his responses to avoid making a volunteered, incriminatory statement. This task is not and should not be the responsibility of the probation officer who cannot know which areas of discussion pose incriminatory risks for the respondent. In this context, the choice offered the respondent regarding his participation in the interview was legitimate; delaying interviews at the request of the respondent, who has had prior opportunity to consult with counsel, is unworkable.[7] The state legislature regulates the operations of the probation department and requires the prompt preparation and filing of PSI reports in part to prevent defendants awaiting sentencing from languishing in jail.

C. The nature of the PSI interview does not justify the extension of right to counsel beyond prior notice and an opportunity to consult with counsel.

Respondent now argues that the denial of his request to postpone the PSI interview violated his right to counsel since the PSI interview constitutes a critical stage. While the sentencing hearing is unquestionably a critical stage demanding the assistance of counsel, *Mempa v. Rhay*, 389 U.S. 128 (1967), the PSI interview is not. First, the PSI interview must be distinguished from the sentencing hearing itself. The interview is focused on the gathering of information for consideration by the sentencing judge. As this Court has noted, "a sentence is characteristically determined in large part on the basis of information,

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[7] Cf. *Gerstein v. Pugh*, 420 U.S. 103, 122 n. 23 (1975). The decision suggests that a constitutional doctrine requiring added procedures for all persons awaiting sentencing could exacerbate the problem of delay in sentencing.

such as the presentence report . . . . and much that goes into [the sentencing] is the result of inquiry that is non-adversary in nature." *United States v. DiFrancesco*, 449 U.S. 134, 136-37 (1980). The interview of a respondent by the probation officer is not a "trial-like confrontation," involving a procedural system or an expert adversary. Thus, the extension of the right to counsel to this phase of the proceedings is not justified. The PSI interview does not pose the same dangers that gave birth initially to the Sixth Amendment right. *United States v. Ash*, 413 U.S. 300, 311 (1972).

D. Under the Ash test, respondent's rights were not violated.

1. *Respondent did not need help coping with the legal system at the time of interview.*

The PSI interview does not satisfy the governing test, announced in *United States v. Ash*, 413 U.S. 300 (1972), for determining when the Sixth Amendment right to counsel applies. Simply put, to warrant an extension of the right to counsel, the accused must be "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Id.* at 310. In this case, the "procedural system" had already revealed to respondent and counsel the upcoming PSI interview. Respondent could have received the advice of counsel "in making the significant decision of whether to submit" to the PSI interview. *Estelle v. Smith*, 451 U.S. 454, 471 (1980). *See also United States ex rel. Bachman v. Hardy*, 637 F. Supp. 1273 (N.D. Ill. 1986).[8] Foreknowledge of a court-ordered sentencing examination gave defense counsel an opportunity to advise his client about whether to submit to the interview process and how to conduct himself. The respondent knew or should have known how to

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[8] While the court decided this point under a Fifth Amendment analysis, the same logic applies here.

cope with this interview since the interview and its purpose were not unexpected.

2. Respondent was not confronted by an expert adversary.

The second component of the test involves the presence of an expert adversary. The probation officer is not an expert adversary; the probation officer has the job of providing "the sentencing court with succinct and precise information upon which to base a rational sentencing decision . . ." *State v. Chambers*, 144 Vt. 377, 383, 477 A.2d 974, 978-79 (1984), quoting from *State v. Rathburn*, 140 Vt. 382, 388, 442 A.2d 452, 455 (1981). Respondent did not require "assistance in meeting his adversary," *United States v. Ash*, 413 U.S. at 313, since the PSI is merely "a 'routine' presentence interview . . . restricted to gathering information upon which the district court, in its discretion, may rely when imposing sentence." *Baumann v. United States*, 692 F.2d 565, 576 (9th Cir. 1982). *See also Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987) (the report is written by a neutral "arm of the court charged with assisting the Court in arriving at a fair sentence").

In *Estelle v. Smith*, *supra*, this Court found that a pre-trial psychiatric interview became a "critical stage" because of a lack of notice regarding the scope of the psychiatric examination and the future use of defendant's statements at the penalty phase of the proceeding. Both criteria of the critical stage test were present. Respondent was not assisted by counsel when he decided whether or not to submit to the examination. The examining psychiatrist became an adversary when the prosecution used the psychiatrist's conclusions, derived from the examination, to establish an essential element to the imposition of a capital sentence at the penalty phase of the case. *Id.* at 471.

The instant case differs in all significant respects. Here, Cox had "the guiding hand of counsel," *Powell v.*

Alabama, 287 U.S. 45, 69 (1932), or at least the opportunity to confer with counsel in advance of the interview. Respondent and his counsel understood the potentially far-ranging scope of the interview and its role at sentencing. Unlike *Estelle* where the *use* of defendant's statements established a critical element of proof at the penalty phase, at the PSI interview the entire PSI, including respondent's comments, and the conclusions of the probation officer are non-binding recommendations. "It was not part of the investigative and identification process, preceding arrest, aimed at ferreting out the guilty, suffused with the risk of police abuse and the possibility of implicating the innocent." *United States v. Baird*, 414 F.2d 700, 711-12 (2nd Cir. 1969). As a neutral arm of the criminal justice system, the probation officer may recommend a sentence to be served or alternatives to incarceration such as a fine and/or probation, a deferred sentence or community service. The officer is not simply another voice of the prosecution. *See also Griffin v. Wisconsin*, —— U.S. ——, ——, 107 S.Ct. 3164, 3169 (1987) (in light of his function the probation officer is not considered a police officer).

3. *Even if the PSI interview was deemed a "critical stage," there is no* per se *Sixth Amendment violation.*

Any purported infringement of respondent's right to counsel is dispelled since "the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant." *United States v. Ash*, 413 U.S. at 315. Under federal and state rules of criminal procedure, the defense could examine the relevant portions of the PSI report, i.e., those parts containing the respondent's own statements, in advance of the sentencing hearing to determine its accuracy and truthfulness. As the hearing, defendant's counsel may cross-examine the preparer of the report or call any

witness to guarantee adherence to constitutional requirements. *See* V.R.Cr.P. 32(c)(4); *State v. Ramsay*, 146 Vt. 70, 78, 99 A.2d 15, 20 (1985). The risks inherent in the practice of the announced PSI interview do not require "an extraordinary system of safeguards." *United States v. Ash*, 413 U.S. at 321.

E. There is no right to actual presence of counsel at the interview.

The extension of respondent's argument would result in the presence of defense counsel at the actual interview. Such an outcome is not legally required and could create serious obstacles for the preparer and readers of the sentencing report. Thus, there is no reason to change the extent of the defendant's Sixth Amendment protections, outlined in *Estelle v. Smith*, 451 U.S. at 470-71, relying on *Thornton v. Corcoran*, 407 F.2d 695, 705, 711 (D.C. Cir. 1969) (opinion concurring in part and dissenting in part), where the Court distinguished between a right to counsel *before* the interview and a right to counsel *during* the interview. Attendance of counsel or counsel's investigator, who is not trained in the law, would seriously undermine the exchange of information from respondent during the PSI. *Tippett v. Maryland*, 436 F.2d 1153, 1158 (4th Cir. 1971).

While the Sixth Amendment guarantees the right to rely on counsel as a "medium," *Maine v. Moulton*, —— U.S. ——, ——, 106 S.Ct. 477, 487 (1985), such a right is limited by context. As noted by then Judge Scalia in *United States v. Byers*, 740 F.2d 1104, 1120 (D.C. Cir. 1984), distinguishing *United States v. Wade*, 388 U.S. 218, 237 (1967), there are "substantial countervailing policy considerations [that] have been advanced against the requirement of the presence of counsel." Like a psychiatric interview, the presence of counsel at the PSI interview could seriously inhibit the information gathering function of the PSI, contribute to delays in scheduling interviews, and adversely influence the range of

material relied on by the court in the sentencing decision. Grappling with defense counsel at an interview creates an unnecessary burden for the probation officer [9] and adds little protection for the defendant who has the opportunity to consult with his attorney prior to submitting to the interview.

F. Even if the respondent's right to counsel was violated, such error is harmless.

Conceding, arguendo, that the respondent's Sixth Amendment right to counsel was somehow violated, such error is harmless. This Court has "recognized the necessity for preserving society's interest in the administration of criminal justice." *United States v. Morrison*, 449 U.S. 361, 364 (1980). Thus, "the general rule [is] that remedies should be tailored to the injury suffered from the constitutional violation" and should not unnecessarily infringe on competing interests. *Id.* The respondent's claim is premised on the court's consideration of "damaging admissions." Since these admissions were not barred by the Fifth Amendment, as discussed in Petitioner's Brief,[10] there was no harm caused by the absence of counsel at the PSI interview. The Court need not fashion a remedy in the absence of any real injury.

II. THIS CAUSE IS NOT MOOT.

Respondent was sentenced to serve three consecutive terms totalling eighteen months to three years. J.A. 1, 24. Respondent's sentence was not stayed pending appeal. By the time the state supreme court decided the merits of the appeal, respondent had served his entire sentence and the Department of Corrections had released

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[9] Cf. *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1972) (the introduction of counsel into an informal, factfinding proceeding could prolong the task and create inflated financial costs while at the same time lessening the effectiveness of the process.)

[10] Briefly stated, the admissions were not compelled, the privilege was not asserted, and the penalty was not enhanced.

him.[11] Pursuant to the state court's decision, respondent's sentence was vacated; respondent was entitled to a new sentence before a different judge with a new PSI report. Under these circumstances Cox could receive a sentence different from that originally imposed. Under Vermont law, he could receive the same sentence, a higher sentence, a lower sentence, or even a deferred sentence. Pursuant to 13 V.S.A. § 7041, the court may defer sentencing and place the respondent on probation. "Upon fulfillment of the terms of probation and of the deferred sentence agreement, the court shall *strike the adjudication of guilt and discharge the respondent.*" 13 V.S.A. § 7041(b) (emphasis added).

Thus, the completion of his sentence does not make the existing controversy moot since the respondent could receive a deferred sentence at a resentencing hearing. The possibility of the complete expungement of conviction demonstrates the live nature of this controversy.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court should be reversed.

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[11] At present respondent's whereabouts are unknown. As stated in *United States v. Sharpe*, 470 U.S. 675, 681 n. 2 (1985), the respondent's absence from the jurisdiction does not render this case moot.

Supreme Court, U.S.
FILED
JUN 22 1987
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CLERK

No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,

Petitioner

v.

RICK COX,

Respondent

On Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

Was the Vermont Supreme Court correct in holding that the Fifth Amendment was violated when a probation officer solicited incriminating information from respondent, who was incarcerated, after the probation officer had refused respondent's request to defer the interview until he had sought advice from an agent of respondent's counsel? Should the decision of the Vermont Supreme Court be affirmed on other grounds: (1) Did the probation officer's solicitation of information from respondent in the circumstances of this case violate respondent's Sixth Amendment right to counsel? (2) Were respondent's incriminating statements to the probation officer inadmissible against him at sentencing because respondent was not given *Miranda* warnings before the probation officer questioned him?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
SUMMARY OF ARGUMENT	1
ARGUMENT:	
I. The Probation Officer's Insistence That Respondent Participate In The PSI Interview Without Advice Of Counsel, Or Not At All, Compelled Respondent's Incrimination In Violation Of The Fifth Amendment.	1
II. Respondent Possessed And Asserted His Sixth Amendment Right To Advice Of Counsel Before The PSI Interview; The Record Does Not Establish That Respondent Waived His Sixth Amendment Right To Counsel	12
III. An Incarcerated Convicted Defendant Should Be Given *Miranda* Warnings Before A PSI Interview	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:	Page
Baumann v. *United States*, 692 F.2d 565 (9th Cir. 1982)	14
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	18
Brooks v. *Tennessee*, 406 U.S. 605 (1972)	3, 5
Cervantes v. *Walker*, 589 F.2d 424 (9th Cir. 1978)	17
Edwards v. *Arizona*, 451 U.S. 477 (1981)	13
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	13
Estelle v. *Smith*, 451 U.S. 454 (1981)	4
Fare v. *Michael C.*, 442 U.S. 707 (1979)	11, 12
Gardner v. *Broderick*, 392 U.S. 273 (1968)	2
Garner v. *United States*, 424 U.S. 648 (1976)	9, 10
Garrity v. *New Jersey*, 385 U.S. 493 (1967)	2
Griffin v. *California*, 380 U.S. 609 (1965)	3
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977)	3
Lefkowitz v. *Turley*, 414 U.S. 70 (1973)	2, 3
Maine v. *Moulton*, ___ U.S. ___, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)	15
Malloy v. *Hogan*, 378 U.S. 1 (1964)	3
Massiah v. *United States*, 377 U.S. 201 (1964)	15

Table of Authorities Continued

Cases:	Page
Mathis v. *United States*, 391 U.S. 1 (1968)	16
McCarthy v. *Arndstein*, 266 U.S. 34 (1924)	2
McGautha v. *California*, 402 U.S. 183 (1971)	4, 5
Mempa v. *Rhay*, 389 U.S. 128 (1967)	12
Michigan v. *Jackson*, ___ U.S. ___, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)	13
Minnesota v. *Murphy*, 465 U.S. 420 (1984)	4, 10, 11, 15, 18
Miranda v. *Arizona*, 384 U.S. 436 (1966)	11, 13, 15
Moran v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)	18
Sanitation Men v. *Sanitation Comm'r*, 392 U.S. 280 (1968)	2
State v. *Cox*, 519 A.2d 1144 (Vt. 1986)	4
United States v. *Ash*, 413 U.S. 300 (1973)	15
United States v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984)	5
United States v. *Cadmus*, 614 F.Supp. 367 (S.D.N.Y. 1985)	17
United States v. *Conley*, 779 F.2d 970 (4th Cir. 1985)	17
United States v. *Gouveia*, 467 U.S. 180 (1984)	12
United States v. *Mandujano*, 425 U.S. 564 (1976)	9
United States ex rel. Riley v. *Franzen*, 653 F.2d 1153 (7th Cir. 1981)	12
United States v. *Wade*, 388 U.S. 218 (1967)	14
United States v. *Washington*, 431 U.S. 181 (1977)	9
Whitley v. *Albers*, ___ U.S. ___, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)	12, 16
Williams v. *Florida*, 399 U.S. 78 (1970)	5
CONSTITUTION AND RULE:	
U.S. Const. Amend. V	*passim*
U.S. Const. Amend. VI	*passim*
Vermont Rule of Evidence 502	12
STATUTE:	
28 Vermont Statutes Annotated § 204	9
MISCELLANEOUS:	
III ABA Standards for Criminal Justice, "Sentencing Alternatives and Procedures," Commentary to Standard 18-5.5, page 18-383 (2d Ed. 1980)	8

Table of Authorities Continued

Cases: Page

III ABA Standards for Criminal Justice, "Sentencing Alternatives and Procedures," Commentary to Standard 18-6.3, pages 18-442-444 (2d Ed. 1980)..... 6, 7, 8

Carroll, "The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative," 37 Mercer L.Rev. 981, 988 (1986) 6

SUMMARY OF ARGUMENT

Because the state had no legitimate, or such an insubstantial, interest in conducting a presentence investigation (PSI) interview with respondent before honoring his request for legal advice about the interview, and because the probation officer incorrectly told respondent that he must speak to her without consultation with counsel or forfeit completely his opportunity to make a statement for inclusion in the PSI report, his incriminating statements to the probation officer were compelled and involuntary, and thus inadmissible, under the Fifth Amendment. The decision of the Vermont Supreme Court is also correct because the probation officer's insistence that respondent proceed with the interview, if at all, without legal advice, which respondent requested, violated the right to assistance of counsel secured by the Sixth Amendment. Finally, the failure of the probation officer to give respondent *Miranda* warnings before the PSI interview justifies the Vermont Supreme Court's decision excluding respondent's incriminating statements from the PSI report and from use in sentencing respondent.

ARGUMENT

I. The Probation Officer's Insistence That Respondent Participate In The PSI Interview Without Advice Of Counsel, Or Not At All, Compelled Respondent's Incrimination In Violation Of The Fifth Amendment.

This case involves a convicted but unsentenced defendant who told a probation officer that he wanted the chance to confer with a representative of his attorney's office before participation in a presentence investigation (PSI) interview. The probation officer offered respondent, the defendant, the choice between forfeiting his opportunity to include a statement in the PSI report if he chose to await the arrival of the defense investigator and speaking

to her at once without counsel's advice. Because the choice put to respondent made the exercise of the privilege costly—if he claimed the privilege, he lost the chance to speak for the PSI report—, respondent's statements included in the PSI report were compelled and thus inadmissible at sentencing.

In a series of cases, this Court has prohibited states from burdening the exercise of Fifth Amendment rights by imposing a penalty upon persons who claim the privilege. In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), the Court held that persons threatened with discharge from employment for claiming the Fifth Amendment privilege did not act freely when they answered official questions:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. . . . We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. 385 U.S. at 497-498 (footnote omitted).

Likewise, in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), the Court invalidated the discharge of a policeman for refusing to waive his Fifth Amendment privilege. A similar result was reached in *Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968). Later, the Court held that requiring public contractors to waive the protections of the Fifth Amendment or to lose their current contracts and be barred from future transactions violated the privilege against self-incrimination. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). The *Turley* Court, quoting *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924), held that

> [t]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is

> sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. 414 U.S. at 77.

The *Turley* Court noted that ". . . claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." *Id.*, at 78. The Court applied the same rule to officers of political parties in *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

Within the trial process itself, the Court has been unwilling to permit significant burdens on the exercise of the privilege against self-incrimination. In *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that the Fifth Amendment prohibited comment by a prosecutor on a defendant's silence at trial and jury instructions that such silence is evidence of guilt. Permitting such comment, the Court held, ". . . is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614.

In *Brooks* v. *Tennessee*, 406 U.S. 605, 609 (1972), the Court held that the requirement that a defendant testify first in the defense case or not at all was ". . . an impermissible restriction on the defendant's right against self-incrimination, 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence,'" quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964).

In this case, respondent was confronted by an agent of the state who sought to question him. Respondent expressed the need to confer with counsel about participation in the PSI interview—a decision which involved whether to waive or claim the privilege against self-

incrimination.[1] Since the probation officer threatened to impose the penalty of forfeiture of the opportunity to make a statement for the PSI upon respondent if he decided to seek legal advice about whether to speak or remain silent, his disclosure of damaging material to her, as in *Garrity*, was not voluntary and thus could not be used in sentencing him.

The state argues that all respondent was required to do was choose between silence and participation when confronted by the probation officer's request for an interview: "[b]eing asked to make a choice is not violative of the privilege against self-incrimination." BP at 8. Similarly, the Solicitor General, citing *McGautha* v. *California*, 402 U.S. 183 (1971), maintains that ". . . the privilege does not protect an individual from being faced with hard choices as to whether to exercise the privilege." BUS at 7. While it may be true that it is not unconstitutional to require a choice, it requires a great leap beyond the principles of *McGautha* to maintain that the state can require a defendant represented by counsel to make this hard choice without counsel's assistance solely to satisfy a probation officer's convenience.[2] The "hard choices" required by

[1] The state and the Solicitor General concede that the Fifth Amendment is available to a convicted but unsentenced defendant. See Brief of the Petitioner (hereafter "BP") at 13-14; Brief of the United States (hereafter "BUS") at 6 n. 2. See also *Estelle* v. *Smith*, 451 U.S. 454, 462-463 (1981); *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984).

[2] There is no suggestion in the record that respondent's request for counsel was dilatory or in bad faith. Despite the supposition made by the Solicitor General (BUS at 4-6) that the attorney's agent was late to a prearranged meeting, it is equally as likely that the probation officer just showed up unannounced at the correctional center where respondent was jailed. See J.A. 15. Further, any inference that it was necessary or legitimate for the probation officer to insist that the interview be then or never is belied by the record and the opinion of the Vermont Supreme Court in this case. See *State* v. *Cox*, 519 A.2d 1144, 1146-1147 (Vt. 1986).

McGautha are assumed to be made upon reflection and consultation with counsel; these are "choices with which criminal defendants *and their attorneys* are quite routinely faced." *McGautha, supra*, at 215. (emphasis supplied).

For this Court to find that external pressure on a defendant to speak is not unconstitutional compulsion, the forces contending against silence must at least serve some valid state purpose. See *Williams* v. *Florida*, 399 U.S. 78, 83-86 (1970); *United States* v. *Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (opinion of Scalia, J.); *McGautha, supra*, at 214-217. Even then, the Fifth Amendment privilege often will override a clearly valid and substantial state interest. For example, in *Brooks* v. *Tennessee, supra*, the legitimate state interest in preventing the defendant from coloring his testimony in response to prior defense witnesses was not found sufficient to uphold Tennessee's requirement that the defendant testify first in the defense case or not at all. Such a requirement, the Court held, denied an accused the free choice to decide if and when to forgo his Fifth Amendment privilege. 406 U.S. at 609-612. The "now or never" choice put to respondent in this case was justified by an interest much less substantial than the state's interest in *Brooks*.

According to the state and the Solicitor General, no "compulsion" within the meaning of the Fifth Amendment occurred by requiring respondent to speak at the PSI interview before receiving counsel's advice or to lose the chance to make a statement for inclusion in the PSI; it is argued that respondent would have lost nothing of value by remaining silent at the interview since he had the right to speak at the sentencing hearing itself. This claim inaccurately devalues the importance of a defendant's decision whether to offer or decline a statement for inclusion in the

PSI report and erroneously equates the right of allocution with the defendant's statement in a PSI report.

While respondent would not denigrate the importance of the right of allocution, it is not accurate to equate this one shot chance with the influence the PSI report has on a defendant's sentence, prison classification and program, and chance for parole. "It is impossible to overemphasize the importance of the PSI report. The PSI report is 'a critical document' and is the primary source of information about a criminal defendant's background 'for all stages of the correctional process' including, of course, sentencing." Carroll, "The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative," 37 Mercer L. Rev. 981, 988 (1986). [footnotes omitted] The state and the Solicitor General both note the critical importance at sentencing of the defendant's PSI statement. See BP at 15-16; BUS at 18 n. 11. It is curious that they then denigrate the importance of the choice faced by respondent when confronted by the probation officer.

Leading authorities counsel defense lawyers to assist their clients during presentence investigations. The ABA Standards for Criminal Justice comment:

> The presentence investigation is little understood by most defendants. As a result, some defendants will act contrary to their own interests by being uncooperative and closemouthed. Those even more ignorant of the investigation's purposes may brag of crimes and criminal associations more fanciful than real.
>
> * * *
>
> Counsel's functions vis-a-vis the probation officer are perhaps even more important. Although it is not recommended that counsel turn the presentence

interview between the probation officer and the defendant into an adversarial exchange, there are a number of useful functions counsel can perform at this juncture: information can be marshaled, extenuating circumstances detailed, and the defendant's views better articulated. In cases where counsel and the probation officer share "a similar social milieu," it has been observed that the presence of counsel can establish a better rapport and thus increase the flow of information. An experienced practitioner has indeed argued that counsel's presence at these interviews should be mandatory:

> Counsel *must* arrange to be present with his client at the time of the presentence (or prepleading) investigation interview. Eight or ten years ago, such presence was virtually unknown. The social workers who conduct the presentence interview (ordinarily, probation department personnel) and prepare the report for the court resented the intrusion of counsel, stating that this interfered with the "one-to-one relationship" with the defendant. Happily, the constitutional right to counsel at every stage of the proceedings has overridden this objection, and, in many jurisdictions, the interviews are open to the presence of counsel. Sadly, however, most counsel still do not attend their clients' presentence interviews.

> The role of counsel at the presentence interview can be critical. Unfortunately, most defendants are not very bright. If they were, they would not be making their living in the fashion that led to the criminal charges, or they would not have been caught. Most are not articulate. Many are members of ethnic minorities, frequently lacking in communicative skills and more frequently with problems of comprehending anything terribly complicated. To send such defendants in, without counsel at their side, for interviews that will figure

> critically in the presentence investigator's report, is itself almost criminal.
>
> These standards recommend but do not require the attorney's presence; however, they believe counsel should always prepare the client for the interview. Counsel's participation in the interview should be modest, aimed more at clarification and supplementation than at oral advocacy. Counsel should also understand the logistical difficulties under which most probation officers labor and should seek to accommodate his or her schedule to theirs. The issue of the privileged character of statements made at the probation officer interview is not addressed by these standards, but it is recognized that defense counsel should apprise the client of the applicable law in this regard.

III ABA Standards for Criminal Justice, "Sentencing Alternatives and Procedures," Commentary to Standard 18-6.3, pages 18.442-444 (2d Ed. 1980) (footnotes omitted).

To be contrasted are the Standards' comments on the right of allocution:

> By the time the judge comes to the bench, the judge is usually in a sentencing mood. He has studied the case, including the presentence report, and has done the best he can. He may have several men to sentence and other cases and motions awaiting hearing as well. He is about to announce the sentence. The allocution sometimes changes the contemplated sentence, but not usually.
>
> *Id.*, Commentary to Standard 18-5.5, at 18.383 (footnote omitted).

It is thus disingenuous to suggest that a defendant's comments immediately before sentence is announced have the

same influence on the sentence as a defendant's statement in the PSI report.

Substantial pressure was exerted on respondent to participate in the interview. He was incarcerated, and the probation officer sought to interview him in accordance with the trial court's order to prepare a PSI report. See 28 Vermont Statutes Annotated § 204; J.A. 1. The situation confronting grand jury witnesses is very different from the circumstances facing respondent. In *United States* v. *Mandujano*, 425 U.S. 564 (1976) (plurality opinion), the Court held that false statements made by a grand jury witness when called to testify about criminal activites in which he may have been involved could be admitted in the witness's perjury prosecution even if the witness had not received *Miranda* warnings. However, in *Mandujano*, unlike this case, the witness was advised before he testified that he was not required to incriminate himself, that he must answer nonincriminating questions, and that false answers could result in a perjury prosecution. Mandujano was also told that he could leave the grand jury room to confer with counsel. Respondent was denied this opportunity.

In *United States* v. *Washington*, 431 U.S. 181 (1977), the defendant was called before a grand jury and given "comprehensive warnings" about assistance of counsel and the right to remain silent. 431 U.S. at 186. The Court found that these warnings eliminated any compulsion that may have arisen from the grand jury setting. Likewise, in *Garner* v. *United States*, 424 U.S. 648 (1976),[3] where the Court held that the duty to file an income tax return was

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[3] *Garner* also rejects the state's claim (SB at 16-17) that one may safely wait until a criminal prosecution ensues to assert the Fifth Amendment privilege. See 424 U.S. at 653-656.

not itself unconstitutional compulsion to incriminate oneself, it is significant that the taxpayer could have prepared the return with advice of counsel and could have asserted the privilege with regard to particular matters requested in the return. The Court noted:

> In fact, a taxpayer, who can complete his return at leisure and with legal assistance, is even less subject to the psychological pressures at issue in *Miranda* than a witness who has been called to testify in judicial proceedings. 424 U.S. at 658.

In the foregoing cases, the person questioned was not incarcerated and was not required to make an immediate and irrevocable decision, without counsel, to claim or forgo the privilege. In contrast, the probation officer's "now or never" choice to respondent, and respondent's incarceration, compelled him to participate in the interview.

Of this Court's decisions, *Minnesota* v. *Murphy*, 465 U.S. 420 (1984) is perhaps the closest to this case. In *Murphy*, the Court held that an unincarcerated probationer under a general duty to answer truthfully his probation officer's questions could and must claim his Fifth Amendment privilege in response to incriminating queries. Failure to claim the privilege when the questions were asked amounted to a forfeiture of the privilege. In deciding that the circumstances of Murphy's questioning were not coercive, the Court noted that Murphy was free to terminate the interview at any time without adverse consequences, was not incarcerated, and did not ask for assistance of counsel at the interview.[4]

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[4] This Court accepted the lower court's conclusion that Murphy's reference to getting a lawyer was not in connection with the probation officer's questioning but rather in connection with a possible suit for breach of the confidentiality of Murphy's drug therapy program. 465 U.S. at 424 n. 3.

In contrast, respondent in this case was incarcerated. There is no certainty from the record that the interview was mutually prearranged. Finally, and most important, respondent expressly sought legal advice about whether to claim or waive his Fifth Amendment privilege;[5] in response, the probation officer told him that exercise of this option would amount to forfeiture of his right to include a statement in the PSI report. Under these circumstances, respondent's statements to the probation officer were not voluntary. To suggest, with the Solicitor General (BUS at 10-13), that an incarcerated defendant be required to decide on his own which questions are incriminating and which may be safely or wisely answered proposes a rule that might work for incarcerated defendants who also happen to be lawyers; for the average inmate, such a rule is completely impractical.

The state and the Solicitor General suggest that a PSI interview is a benign procedure designed to help the defendant. See BP at 23-24; BUS at 18 and n. 11. Such a view ignores the teachings of this Court that a probation officer, whatever his or her relationship with the probationer, has no duty to preserve the probationer's confidences; "[a] probationer cannot pretend ignorance of the fact that his probation officer 'is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers.'" *Minnesota* v. *Murphy*, *supra*, at 432, quoting *Fare* v. *Michael C.*, 442 U.S. 707, 720 (1979). In her role as gatherer of information for the PSI report, the probation officer's function is even closer to that of an

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[5] A request for counsel during questioning is normally viewed as an assertion of the right to remain silent. See *Miranda* v. *Arizona*, 384 U.S. 436, 444-445, 473-474 (1966); *Fare* v. *Michael C.*, 442 U.S. 707, 719 (1979). In this case, respondent also asserted directly his right to remain silent until he could confer with the defense investigator.

interrogating police officer than when, as in *Murphy*, she supervises a defendant on probation.

For all the foregoing reasons, the Vermont Supreme Court's decision should be affirmed.

II. Respondent Possessed And Asserted His Sixth Amendment Right To Advice Of Counsel Before The PSI Interview; The Record Does Not Establish That Respondent Waived His Sixth Amendment Right To Counsel

Immediately before the PSI interview, respondent asked to consult with counsel. Respondent's Sixth Amendment right to counsel had attached upon commencement of the prosecution, see *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). This Sixth Amendment right still attended him since he had not yet been sentenced. See *Mempa* v. *Rhay*, 389 U.S. 128, 133-34 (1967).[6] After his request for a chance to confer with counsel[7] was not honored, respondent then spoke with the probation officer. Under these circumstances, no waiver of the Sixth Amendment right to counsel occurred.[8]

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[6] The right to counsel at sentencing was all the more important in this case since by his pleas respondent waived the right to contest guilt at trial.

[7] The Solicitor General concedes that respondent's request to speak with a defense investigator was a request for counsel. BUS at 4, n. 1. The state does not challenge this conclusion of the Vermont Supreme Court. There seems little doubt that respondent's request should be considered a request for counsel, since the investigator by training could perform many of counsel's advisory functions and could have confidential communications with respondent. See Vermont Rule of Evidence 502. Compare *Fare* v. *Michael C.*, *supra*, 442 U.S. at 719-724; *United States ex rel. Riley* v. *Franzen*, 653 F.2d 1153, 1158-1162 (7th Cir. 1981).

[8] Respondent relied, *inter alia*, on the Sixth Amendment right to counsel in his appeal to the Vermont Supreme Court, and its judgment may be affirmed on this ground. *Whitley* v. *Albers*, ____ U.S. ____, 106 S.Ct. 1078, 89 L.Ed.2d 251, 265 (1986).

In *Michigan* v. *Jackson*, ___ U.S. ___, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the Court decided that the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), governing waivers of the Fifth Amendment right to counsel asserted during custodial interrogation, applied to waivers of the Sixth Amendment right to counsel asserted at arraignment on criminal charges. The Court reaffirmed the principle that the Sixth Amendment right to counsel is broader than the right to counsel discussed in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which applies only to custodial interrogations. The *Jackson* court noted that it would make no sense to give Sixth Amendment counsel rights less protection than the *Miranda* right to counsel: "In our opinion, . . . the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." 89 L.Ed.2d at 639.[9]

In this case, the record shows that respondent spoke to the probation officer only after he asked for time to consult with counsel and that request was not honored. Nothing in the record indicates that respondent voluntarily initiated further conversations with the probation officer after he requested counsel. Under these circumstances, the respondent's contested statements in the PSI report were obtained in violation of his Sixth Amendment right to counsel.

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[9] The facts of this case are similar to *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). In *Escobedo*, police obtained incriminating statements from the defendant after he had requested and been refused the opportunity to talk with his lawyer. While the holding of *Escobedo* is doubtful under current doctrine governing the attachment of the right to counsel, the circumstances of that case would no doubt constitute a Sixth Amendment violation if, as here, the defendant had been formally charged.

Baumann v. *United States*, 692 F.2d 565 (9th Cir. 1982) is slim authority on the question of the applicability of the Sixth Amendment right to counsel at a PSI interview. The *Baumann* court found that denial of an attorney's advice before a PSI interview is "constitutionally insignificant." *Id.*, at 578. This conclusion derives from labeling the interview "routine," (and thus, presumably unimportant) and adverting to the wide discretion of the sentencing judge to fashion a sentence. *Id.* This view of the importance of the PSI report and what a defendant says for inclusion in it is at odds with the authorities cited in Part I, *supra*, and this Court's "critical stage" cases.

In *United States* v. *Wade*, 388 U.S. 218 (1967), the Court identified certain characteristics of pretrial lineups which made assistance of counsel at those proceedings "critical." Each stage of a criminal proceeding must be examined, the *Wade* court wrote, ". . . to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." 388 U.S. at 227. Counsel may not be required if ". . . there is minimal risk that [a defendant's] counsel's absence might derogate from his right to a fair trial.[10] *Id.*, at 228.

Under *Wade*, it can scarcely be maintained that counsel is of little importance in shaping a defendant's input into the most important document used at sentencing and throughout an inmate's prison stay. *Wade* explicitly recognizes the important role of counsel in preserving a defendant's right to remain silent. 388 U.S. at 225. More recently, the Court has emphasized that ". . . the Sixth

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[10] It is appropriate in a case disposed of by plea, with sentencing the only proceeding of substance, to treat proceedings before sentencing as analogous to pretrial stages in a case that is tried.

Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine* v. *Moulton*, ___ U.S. ___, 106 S.Ct. 477, 88 L.Ed.2d 481, 496 (1985). The *Moulton* court noted that ". . . the right to the assistance of counsel is shaped by the need for the assistance of counsel, ..." *Id.*, at 492. It is hard to imagine a situation in which counsel could be of more benefit to a defendant than in deciding whether to claim or waive the Fifth Amendment privilege. See also *United States* v. *Ash*, 413 U.S. 300, 312 (1973) ("In *Massiah* [v. *United States*, 377 U.S. 201 (1964)], counsel could have advised his client on the benefits of the Fifth Amendment. . . .") Respondent's damaging admissions were thus elicited in violation of his Sixth Amendment right to counsel.

III. An Incarcerated Convicted Defendant Should Be Given *Miranda* Warnings Before A PSI Interview

In *Minnesota* v. *Murphy*, *supra*, this Court held that a probationer who was questioned by his probation officer during a mutually-arranged meeting in the probation officer's office, and who was free at any time to terminate the meeting without adverse consequences, was not entitled to the warnings required by *Miranda* v. *Arizona*, *supra*. 465 U.S. at 433 and n.6. However, "[a] different question would be presented if [Murphy] had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting." 465 U.S. at 429 n. 5. Respondent maintains that this is that case—an interview of an incarcerated defendant by a probation officer to obtain information for use at sentencing.

Although respondent asked the Vermont Supreme Court to hold that *Miranda* warnings were required before respondent's PSI interview, the court did not reach this issue. Respondent contends that the failure of the probation officer to give *Miranda* warnings to respondent renders inadmissible his statements in the PSI interview and that the decision of the Vermont Supreme Court should be affirmed on this ground, despite the Vermont court's lack of reliance on this theory. See, e.g., *Whitley* v. *Albers*, *supra*.

In *Mathis* v. *United States*, 391 U.S. 1 (1968), the Court considered the admissibility of statements obtained from the defendant while he was serving a state prison sentence. The statements were obtained without *Miranda* warnings and were used at the defendant's federal trial for false claims against the government. This Court reversed the holdings of the lower courts that *Miranda* warnings were not required. 391 U.S. at 3.

The government contended in *Mathis* that *Miranda* should not apply because the questions were asked ". . . as part of a routine tax investigation where no criminal proceedings might even be brought, and . . . [the defendant] had not been put in jail by the officers questioning him, but was there for an entirely separate offense." The Court found that "[t]hese differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody." *Id.*, at 4.

Since *Mathis*, a line of cases from the lower federal courts has refused to equate incarceration with *Miranda* "custody." Purporting to see in *Mathis* room for such an interpretation, these courts have required something more than the normal incidents of incarceration to make

jailhouse interrogation of inmates "custodial" under *Miranda*. While respondent finds the distinctions made in these cases dubious in light of *Mathis*, we argue that respondent was entitled to warnings even under this "something extra" test. An examination of these cases shows that the need for *Miranda* warnings was less compelling than in this case.

In perhaps the leading case on the subject, *Cervantes* v. *Walker*, 589 F.2d 424 (9th Cir. 1978), the court made much of the fact that, unlike *Mathis*, the defendant was questioned by prison guards about a matter under investigation in the prison; "[t]he questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself may be said to have constituted an additional imposition on his limited freedom of movement, thus requiring *Miranda* warnings." *Id.*, at 428. Under this test, respondent was entitled to *Miranda* warnings when questioned by the probation officer.

Likewise, in *United States* v. *Conley*, 779 F.2d 970 (4th Cir. 1985), the court, following *Cervantes*, upheld the admission of statements made to prison guards concerning a murder in the prison. On the other hand, the *Conley* court agreed that the district court had properly suppressed statements Conley made without *Miranda* warnings to an FBI agent who came from outside the prison to investigate the homicide. *Id.*, at 974 n. 5.

Other courts and judges have recognized that reading a special requirement of "extra custody" into *Mathis* creates a distincton without a difference, see *Cervantes* v. *Walker*, *supra*, at 429 (Anderson, J., dissenting). See also *United States* v. *Cadmus*, 614 F.Supp. 367 (S.D.N.Y. 1985). Further, to require a special test for *Miranda*

"custody" in prison that turns on numerous variables would make the work of investigators and judges more difficult. "As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran* v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135, 89 L.Ed.2d 410, 423 (1986), quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 430 (1984).

It should also be stressed that the probation officer/defendant contact in this case was different in purpose as well as in circumstances from the situation in *Minnesota* v. *Murphy*, *supra*. In *Murphy*, the interview was arranged as part of ongoing supervision of a probationer who had already been granted the substantial benefit of conditional release and who obviously knew that periodic inquiry by his probation officer about his rehabilitation was to be expected. See 465 U.S. at 432. In contrast, the probation officer in this case was performing the role of interrogator in her contact with respondent; his sentence had yet to be determined and this was the only issue of consequence in respondent's case since he had waived trial by his pleas. Thus, even if there is some merit to the view that probationers enjoyed diminished constitutional rights as compared to other citizens, that principle has no application before a defendant's sentence is determined.

Since there is no evidence that *Miranda* warnings were given to respondent, the Vermont Supreme Court's decision should be affirmed.

CONCLUSION

The judgment of the Vermont Supreme Court should be affirmed.

Respectfully submitted,

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